Supreme Court, U.S.
FILED

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No. 97 1051 DEC 23 1997

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

G. WAYNE "DUKE" SMITH, *et al.*,
Petitioners,

v.

KEVIN L. HARRIS,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

BRENDAN V. SULLIVAN, JR.
GLENN J. PFADENHAUER
KATHLEEN M. GRILLO
WILLIAMS & CONNOLLY
725 Twelfth Street, N.W.
Washington, D.C. 20005
(202) 434-5000
Counsel for Petitioners McGavin, Hazen, Carnegie, Gore and Glenn

DAN K. WEBB
HOWARD M. PEARL
BRUCE R. BRAUN
WINSTON & STRAWN
35 West Wacker Drive
Chicago, Illinois 60601
(312) 558-5600
Counsel for Petitioner Potts

MICHAEL L. MARTINEZ
Counsel of Record
PHILIP T. EVANS
HOLLAND & KNIGHT LLP
2100 Pennsylvania Ave., N.W.
Suite 400
Washington, D.C. 20037
(202) 955-3000
Counsel for Petitioner Smith

CHARLES S. LEEPER
WILLIAM B. JACOBSON
SPRIGGS & HOLLINGSWORTH
1350 Eye Street, N.W.
Washington, D.C. 20005
(202) 898-5800
Counsel for Petitioners Perez and Hudson

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QUESTION PRESENTED

Whether a *Bivens* conspiracy claim that does not contain specific factual allegations connecting a defendant to the conspiracy may withstand a motion to dismiss based on qualified immunity by that defendant.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in this case were as follows:

Kevin L. Harris, plaintiff;

Arthur Roderick, Larry Cooper, G. Wayne "Duke" Smith, Jose Antonio "Tony" Perez, Henry Hudson, Richard Rogers, Larry Potts, Lon T. Horiuchi, Steve McGavin, Les Hazen, Dale Carnegie, William D. Gore, Eugene F. Glenn, and John Does, number 1 through 50, defendants;

The United States of America, defendant.

Only G. Wayne "Duke" Smith, Jose Antonio "Tony" Perez, Henry Hudson, Larry Potts, Steve McGavin, Les Hazen, Dale Carnegie, William D. Gore and Eugene F. Glenn join this petition for writ of certiorari.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. ———

G. WAYNE "DUKE" SMITH, *et al.*,
Petitioners,

v.

KEVIN L. HARRIS,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR WRIT OF CERTIORARI

Petitioners G. Wayne "Duke" Smith, Jose Antonio "Tony" Perez, Henry Hudson, Larry Potts, Steve McGavin, Les Hazen, Dale Carnegie, William D. Gore and Eugene F. Glenn respectfully petition for writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 126 F.3d 1189 (9th Cir. 1997) and is reprinted in the Appendix ("App.") at 1a-31a. The Memorandum Decision and Order of the United States District Court for the District of Idaho is reported at 933 F. Supp. 977 (D. Idaho 1996) and is reprinted at App. 32a-50a.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit issued its opinion and entered its judgment on September 25, 1997. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

A. Factual Background

This action, filed pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), arises out of events that occurred in August

1992 at Ruby Ridge in Boundary County, Idaho. Petitioners are nine current or former law enforcement officials; six affiliated with the Federal Bureau of Investigation ("F.B.I.") and three affiliated with the United States Marshals Service.

In his Second Amended Complaint ("Complaint"),[1] respondent Kevin L. Harris alleges that on August 21, 1992, six Deputy United States Marshals were in the area of property owned by Randall Weaver at Ruby Ridge, Idaho, "ostensibl[y]" to serve "an arrest warrant" on Weaver. Compl. ¶¶ 27, 29. After a confrontation near the Weaver property, a "melee of firing" erupted during which Deputy United States Marshal William Degan and Weaver's son were killed. *Id.* ¶¶ 31-35. Respondent admits that he may have fired the shot which killed Deputy Marshal Degan. *Id.* ¶ 35.

The F.B.I. sent its Hostage Rescue Team ("H.R.T.") to Ruby Ridge. *Id.* ¶¶ 40-41. Respondent claims in conclusory allegations that at least thirteen federal law enforcement officers, including petitioners, conspired to formulate "Special Rules of Engagement" under which members of the H.R.T. allegedly were ordered to shoot and kill any armed male observed in the vicinity of the Weaver cabin. *Id.* ¶¶ 43, 45. On August 22, 1992, Lon T. Horiuchi, a member of the H.R.T., in a position overlooking the Weaver cabin, fired shots which injured Weaver and respondent. *Id.* ¶¶ 47, 51, 55, 57.

B. Procedural History

Respondent filed this *Bivens* action, alleging violations of his Fourth, Fifth and Sixth Amendment rights.[2] The

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[1] For the Court's reference, a copy of respondent's Complaint has been lodged with the Clerk's Office.

[2] In addition to petitioners, respondent sued Deputy United States Marshals Arthur Roderick and Larry Cooper and F.B.I. Special Agents Richard Rogers and Lon T. Horiuchi.

district court had subject matter jurisdiction in this case pursuant to 28 U.S.C. § 1331. Each petitioner is sued in his individual capacity.

Respondent's Complaint consists of eighteen counts. Counts One through Five allege constitutional tort violations. In Count Four, respondent contends that all thirteen individual officials, including petitioners, conspired to deny him his Fourth and Fifth Amendment rights by formulating and implementing the Special Rules of Engagement.[3]

Petitioners moved to dismiss the Complaint, asserting the defense of qualified immunity. With respect to the conspiracy allegations in Count Four, the district court dismissed respondent's Fifth Amendment claim, but left intact his claim under the Fourth Amendment. App. 44a-48a. The district court denied petitioners' assertion of qualified immunity without prejudice pending "further factual development." *Id.* 47a. The district court also found that respondent had satisfied the Ninth Circuit Court of Appeals' heightened pleading standard for certain constitutional tort cases. *Id.*[4]

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[3] Count Five of the Complaint alleges that all thirteen officials, including petitioners, aided and abetted Special Agent Lon T. Horiuchi in denying respondent's constitutional rights. Count Six, for declaratory relief, was dismissed with respondent's consent. Counts One, Two and Three, asserted solely against other defendants, and Counts Seven through Eighteen, which allege various claims under state law and the Federal Tort Claims Act against the individual defendants and the United States, are not at issue here.

[4] Petitioners also moved to dismiss Count Five on qualified immunity grounds. The district court declined to dismiss respondent's Fourth Amendment claim, but granted the motion as to his allegations under the Fifth Amendment. App. 48a. Other defendants moved to dismiss Counts One, Two and Three on various grounds. The district court dismissed Count One, but denied the motion as to the Fourth Amendment claims in Counts Two and Three. *Id.* 40a-44a.

Petitioners and the other individual defendants appealed to the Ninth Circuit Court of Appeals pursuant to 28 U.S.C. § 1291 and this Court's decision in *Behrens v. Pelletier*, 516 U.S. ——, 116 S. Ct. 834 (1996) (holding that the denial of a motion to dismiss based on qualified immunity is immediately appealable).[5] The Ninth Circuit affirmed the decision of the district court in all respects.

In one short paragraph, Judge Reinhardt, writing for the panel, rejected petitioners' arguments that respondent had failed to state a *Bivens* conspiracy claim against each individual petitioner. Although the panel did not analyze separately the allegations against each petitioner, it held that respondent adequately stated his claim "with respect to each of the moving defendants." App. 21a. The panel found that the allegations "that several defendants traveled from Washington, D.C., and that they all met or spoke together regarding the formulation of the Special Rules of Engagement" were sufficiently particular to overcome petitioners' motion to dismiss. *Id.*

Petitioners filed this timely petition for certiorari.

REASONS FOR GRANTING THE WRIT

Respondent seeks damages from thirteen federal law enforcement officials. He alleges that all thirteen officials "conspired" to deprive him of his constitutional rights either by creating or acquiescing in the creation of "Special Rules of Engagement" which led to his injury during the Ruby Ridge incident. Petitioners are nine of these officials.

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[5] The appeals filed by Horiuchi (No. 96-35780), Rogers, McGavin, Hazen, Carnegie, Gore and Glenn (No. 96-35781), Smith (No. 96-35782), Potts (No. 96-35783) and Roderick, Cooper, Perez and Hudson (No. 96-35784) were consolidated by the Ninth Circuit Court of Appeals. Roderick and Cooper filed a Petition for Rehearing and Suggestion for Rehearing En Banc of the Ninth Circuit's decision with respect to issues unrelated to this petition, which is pending.

This case raises an issue of critical importance in view of the large number of personal damages actions against federal and state law enforcement officers. Qualified immunity is intended to shield government officials from the burdens of defending against vague and unparticularized claims. But the defense means little, if anything, if a plaintiff may defeat it with no more than conclusory, nonspecific allegations of a conspiracy. The Court should grant certiorari to establish this important principle.

I. THE DOCTRINE OF QUALIFIED IMMUNITY REQUIRES A *BIVENS* PLAINTIFF TO SUPPORT A CONSPIRACY CLAIM WITH SPECIFIC FACTUAL ALLEGATIONS.

The defense of qualified immunity is meant to protect government officials from the burdens of litigating insubstantial lawsuits. *Harlow v. Fitzgerald*, 457 U.S. 800, 813 (1982). Thus, "[u]nless [a] plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

The entitlement to qualified immunity is measured by the "objective reasonableness of an official's conduct," rather than the subjective beliefs motivating his actions. *Harlow*, 457 U.S. at 818. This wholly objective inquiry, however, also must be "fact-specific." *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). To overcome an assertion of qualified immunity, a plaintiff must demonstrate that the right alleged to be violated was "clearly established" in a "particularized" way. *Id.* at 640. It must be clear that "a reasonable official would understand that what he is doing violates that right." *Id.*

While this Court has never held explicitly that qualified immunity requires a plaintiff to plead specific facts in a complaint, such a rule is implicit in the Court's fact-specific approach. *Anderson*, 483 U.S. at 641; *Harlow*,

457 U.S. at 818; *Schultea v. Wood*, 47 F.3d 1427, 1432 (5th Cir. 1995) (en banc). *Anderson* and *Harlow* clearly require lower courts to scrutinize not only the right allegedly violated, but the specific official conduct alleged to have violated that right. *Grant v. City of Pittsburgh*, 98 F.3d 116, 122 (3d Cir. 1996). The very nature of this inquiry demands that a plaintiff "speak to the factual particulars" of his claims. *Schultea*, 47 F.3d at 1432. This includes alleging with specific facts, not vague generalizations, what each government official did to cause the alleged constitutional violation. *See, e.g., Dewey v. University of New Hampshire*, 694 F.2d 1, 3 (1st Cir. 1982).[6]

Qualified immunity means nothing if plaintiffs may survive a motion to dismiss and proceed to discovery based on inadequately pled claims. This Court repeatedly has asserted that the right to qualified immunity is "an *immunity from suit* rather than a mere defense to liability." *Mitchell*, 472 U.S. at 526. The essence of this right is the "entitlement not to stand trial or face the other burdens of litigation." *Id.* Specific factual allegations must be set forth in the initial or amended complaint so that a court may resolve the qualified immunity question "at the earliest possible stage of a litigation." *Anderson*, 483 U.S. at 646 n.6. It is irrelevant that at a later stage qualified immunity will protect an official from liability. An erroneous denial of immunity "conclusive[ly]" deprives

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[6] A number of Circuit Courts of Appeals have recognized this principle by requiring that a plaintiff who asserts certain constitutional damage claims against a government official claiming qualified immunity meet a "heightened" standard of pleading. *Breidenbach v. Bolish*, 126 F.3d 1288, 1292 (10th Cir. 1997); *Crawford-El v. Britton*, 93 F.3d 813, 816-817 (D.C. Cir. 1996) (en banc), *cert. granted*, 117 S. Ct. 2451 (June 16, 1997) (No. 96-827); *Veney v. Hogan*, 70 F.3d 917, 922 (6th Cir. 1995); *Edgington v. Missouri Dep't of Corrections*, 52 F.3d 777, 779 (8th Cir. 1995); *Schultea v. Wood*, 47 F.3d 1427, 1434 (5th Cir. 1995) (en banc); *Branch v. Tunnell*, 14 F.3d 449, 452 (9th Cir. 1994).

an official of this right by forcing him to confront the very burdens he is entitled to avoid. *Behrens v. Pelletier*, 516 U.S. ——, 116 S. Ct. 834, 839-40 (1996).

The need for specific factual allegations is particularly acute when a plaintiff seeks to hold multiple government officials responsible under a conspiracy theory, as respondent does here. Like unconstitutional motive torts, conspiracy claims "frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to society as a whole." *Harlow*, 457 U.S. at 814. And conspiracy claims are particularly susceptible to abuse at the pleading stage. *Angola v. Civiletti*, 666 F.2d 1, 4 (2d Cir. 1981) (conspiracy claims are "easily made" and can cause "such protracted proceedings with such disruption of governmental functions that . . . detailed fact pleading" is necessary).

In addition, conspiracy claims often turn on a government official's subjective *intent*. A civil conspiracy is "a combination of two or more persons who, by some concerted action, intend to accomplish some unlawful objective for the purpose of harming another." *Vieux v. East Bay Regional Park Dist.*, 906 F.2d 1330, 1343 (9th Cir. 1990) (citations omitted). Accordingly, it is entirely appropriate to impose a more demanding pleading burden in both unconstitutional motive and *Bivens* conspiracy cases. Indeed, courts often require more specific factual allegations from a plaintiff alleging a civil rights conspiracy. *Burns v. County of King*, 883 F.2d 819, 821 (9th Cir. 1989); *Fullman v. Graddick*, 739 F.2d 553, 557 (11th Cir. 1984); *Slotnick v. Staviskey*, 560 F.2d 31, 33 (1st Cir. 1977); *Ostrer v. Aronwald*, 567 F.2d 551, 553 (2d Cir. 1977); *see also Foster v. Skinner*, 70 F.3d 1084, 1088 n.7 (9th Cir. 1995) (applying the Ninth Circuit's heightened pleading standard to conspiracy claim).

To ensure that the defense of qualified immunity provides government officials with meaningful protection, this Court should hold that *Bivens* conspiracy allegations must be pled with specific facts which demonstrate how *each* individually sued government official personally participated in the alleged conspiracy.

II. THE NINTH CIRCUIT'S FAILURE TO REQUIRE SPECIFIC FACTS IN SUPPORT OF RESPONDENT'S CONSPIRACY CLAIM DENIED PETITIONERS THEIR SUBSTANTIVE RIGHTS UNDER THE DOCTRINE OF QUALIFIED IMMUNITY.

Although it purported to apply a heightened pleading standard, the Ninth Circuit held that respondent had sufficiently pled his conspiracy claim against all thirteen defendants. The Ninth Circuit erred because the conspiracy claim contains at best only vague and general allegations with respect to the conduct of each petitioner.

Respondent alleges that all thirteen defendants "combined, conspired and confederated together" to violate his Fourth Amendment rights. Compl. ¶ 96. The crux of his claim is that a "group of the Defendants," including petitioners, decided to create "Special Rules of Engagement" which they "knew and intended would lead to the use of excessive force" against him. *Id.* ¶¶ 43, 97. In Count Four—the conspiracy claim—he alleges that all thirteen defendants "created, or acquiesced in the creation," then "changed, or acquiesced in the changing" of these Rules. *Id.* ¶¶ 98(c)-(d). These Special Rules allegedly permitted the officers to kill any armed adult male observed outside the Weavers' residence. *Id.*

Aside from these conclusory assertions, respondent does not plead facts which link each petitioner to the alleged conspiracy. He does not allege which defendants agreed to create the Rules and which defendants merely acquiesced to their creation. He does not allege where or when

any agreement or acquiescence took place. Other than listing their names among the thirteen defendants, respondent barely refers to petitioners at all. The only specific reference to petitioners Smith, Hazen, McGavin and Carnegie is that they travelled to Idaho from Washington, D.C. and communicated with each other—about unspecified matters—either on the telephone, in writing or in person. *Id.* ¶ 98(a)-(b). Respondent does not even allege that much with respect to petitioners Perez, Hudson, Potts, Gore and Glenn.

The few specific factual allegations respondent does include in his conspiracy claim are anything but clear. Throughout Count Four, he refers repeatedly to the "conspirators named above" without clarifying who these "conspirators" are. It is unclear whether these "conspirators" include all thirteen individual defendants or one of the subsets thereof identified elsewhere in the Complaint. Again, he never states specifically who (if any) of the nine petitioners "created," "acquiesced," or "changed" the Special Rules of Engagement.

Without more, these allegations do not state a claim for conspiracy under *Bivens*. Indeed, insofar as respondent alleges that petitioners merely "acquiesced" to the Special Rules of Engagement, he fails to establish a conspiracy at all. *See Fonda v. Gray,* 707 F.2d 435, 438 (9th Cir. 1983) (mere "acquiescence" to a constitutional violation may not establish a conspiracy absent proof of common conspiratorial objective).

Nor do these allegations demonstrate a violation of a clearly established right by each petitioner. In finding these allegations sufficient, the Ninth Circuit's decision conflicts with other Circuits which require that a plaintiff allege specific, nonconclusory facts in support of a *Bivens* or § 1983 claim or face dismissal based on qualified immunity. *Breidenbach v. Bolish,* 126 F.3d 1288, 1292 (10th Cir. 1997) (*Bivens* complaint "must include all

the factual allegations necessary to sustain a conclusion that defendant violated clearly established law") (citations omitted); *Schultea v. Wood*, 47 F.3d 1427, 1434 (5th Cir. 1995) (en banc) (no discovery unless "plaintiff has supported his claim with sufficient precision and factual specificity to raise a genuine issue as to the illegality of defendant's conduct at the time of the alleged acts"); *Veney v. Hogan*, 70 F.3d 917, 922 (6th Cir. 1995) (in face of defense of qualified immunity plaintiff must respond with "specific, non-conclusory allegations of fact that will enable the district court to determine that those facts, if proved, will overcome the defense of qualified immunity"). The Ninth Circuit's approach breaks sharply from the settled law of these Circuits and should be reversed for this reason alone.

The Ninth Circuit's decision cannot be supported by decisions of this Court nor reconciled with decisions of other Circuits. If allowed to stand, this precedent will effectively obliterate a government official's right to qualified immunity with respect to *Bivens* conspiracy claims. Respondent's conspiracy claim contains nothing more than vague and conclusory allegations with respect to petitioners now before the Court.[7] If qualified immunity is to protect government officials from the burdens of insubstantial suits, plaintiffs must be required to support *Bivens* conspiracy claims with specific facts which demonstrate how *each* official conspired to violate a plaintiff's constitutional rights—"who did what to whom and why." *Dewey*

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[7] Respondent's failure to provide any factual detail in support of his claim is particularly egregious in this case. Respondent has been through a criminal trial on the same facts which underlie this *Bivens* action, during which he had access to reams of documents. App. 35a. In addition, there have been several government investigations of the case which have been reported to the public. He has no excuse for failing to plead specifically how each defendant allegedly violated his constitutional rights.

v. University of New Hampshire, 694 F.2d 1, 3 (1st Cir. 1982). Petitioners respectfully submit that this Court should grant the writ to establish this principle.

III. ALTERNATIVELY THIS COURT SHOULD HOLD THIS PETITION PENDING ITS OPINION IN *CRAWFORD-EL v. BRITTON.*

The pleading standard applicable to *Bivens* conspiracy claims is an important issue which this Court should decide. However, the appropriate resolution of this case may become apparent after the Court decides *Crawford-El v. Britton,* 93 F.3d 813 (D.C. Cir. 1996) (en banc), *cert. granted,* 117 S. Ct. 2451 (June 16, 1997, argued December 1, 1997) (No. 96-827). In *Crawford-El v. Britton,* the Court will determine the proper pleading standard for motive-based torts asserted against individual government officials. This decision will bear directly on the question presented here. Accordingly, petitioners respectfully suggest that, in the alternative, the Court defer action on this petition for certiorari until it has rendered a decision in *Crawford-El v. Britton.*

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

BRENDAN V. SULLIVAN, JR.
GLENN J. PFADENHAUER
KATHLEEN M. GRILLO
WILLIAMS & CONNOLLY
725 Twelfth Street, N.W.
Washington, D.C. 20005
(202) 434-5000
Counsel for Petitioners McGavin, Hazen, Carnegie, Gore and Glenn

DAN K. WEBB
HOWARD M. PEARL
BRUCE R. BRAUN
WINSTON & STRAWN
35 West Wacker Drive
Chicago, Illinois 60601
(312) 558-5600
Counsel for Petitioner Potts

December, 1997

MICHAEL L. MARTINEZ
Counsel of Record
PHILIP T. EVANS
HOLLAND & KNIGHT LLP
2100 Pennsylvania Ave., N.W.
Suite 400
Washington, D.C. 20037
(202) 955-3000
Counsel for Petitioner Smith

CHARLES S. LEEPER
WILLIAM B. JACOBSON
SPRIGGS & HOLLINGSWORTH
1350 Eye Street, N.W.
Washington, D.C. 20005
(202) 898-5800
Counsel for Petitioners Perez and Hudson

APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-35780

D.C. No. CV-94-00359-BLW

KEVIN L. HARRIS,
Plaintiff-Appellee,

v.

ARTHUR RODERICK,
Defendant,

and

LON T. HORIUCHI,
Defendant-Appellant.

No. 96-35781

D.C. No. CV-94-00359-BLW

KEVIN L. HARRIS,
Plaintiff-Appellee,

v.

ARTHUR RODERICK,
Defendant,

RICHARD ROGERS,
Defendant-Appellant,

STEVE MCGAVIN,
Defendant-Appellant,

LES HAZEN,
Defendant-Appellant,

DALE CARNEGIE,
Defendant-Appellant.

WILLIAM GORE,
Defendant-Appellant,

and

EUGENE F. GLENN,
Defendant-Appellant.

No. 96-35782

D.C. No. CV-94-00359-BLW

KEVIN L. HARRIS,
Plaintiff-Appellee,
v.

ARTHUR RODERICK,
Defendant,

and

G. WAYNE "DUKE" SMITH,
Defendant-Appellant.

No. 96-35783

D.C. No. CV-94-00359-BLW

KEVIN L. HARRIS,
Plaintiff-Appellee,
v.

ARTHUR RODERICK,
Defendant,

and

LARRY POTTS,
Defendant-Appellant.

No. 96-35784

D.C. No. CV-94-00359-BLW

KEVIN L. HARRIS,
Plaintiff-Appellee,
v.

ARTHUR RODERICK,
Defendant-Appellant,

LARRY COOPER,
Defendant-Appellant,

JOSE ANTONIO "TONY" PEREZ,
Defendant-Appellant,

HENRY HUDSON,
Defendant-Appellant.

Appeals from the United States District Court
for the District of Idaho
B. Lynn Winmill, District Judge, Presiding

Argued and Submitted
April 7, 1997—Seattle, Washington

Filed September 25, 1997

Before: Stephen Reinhardt and Sidney R. Thomas, Circuit Judges, and John W. Sedwick, District Judge.*

Opinion by Judge Reinhardt

OPINION

REINHARDT, Circuit Judge:

Kevin Harris brought a *Bivens*[1] action against thirteen named federal law enforcement agents, as well as several unnamed individuals and the United States for their ac-

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* The Honorable John W. Sedwick, United States District Judge for the District of Alaska, sitting by designation.

[1] *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

tions at Ruby Ridge, Idaho during two days in August 1992. The individual defendants moved to dismiss the complaint, in part on the basis of qualified immunity. The district court granted the motion to dismiss in part, but denied the motion with respect to almost all of the Fourth Amendment claims. The defendants appeal the denial of qualified immunity with respect to the remaining claims, which constitute the heart of Harris's action, and seek dismissal of his complaint in its entirety. We reject the defendants' arguments in toto and affirm the applicable rulings of the district court.

Background

We state the facts, as we must on this appeal, as they are set forth in Kevin Harris's Second Amended Complaint.

On August 21, 1992, six Deputy United States Marshals ("Marshals"): Arthur Roderick, Larry Cooper, William Degan, Thomas Norris, Joseph Thomas, and David Hunt,[2] came onto Randall Weaver's property in Boundary County, Idaho to serve an arrest warrant upon Weaver. Kevin Harris was living on the Weaver property. Cooper, Degan, and Roderick confronted Harris, Weaver, Weaver's 14-year-old son, Sammy, and the Weaver family dog, Striker, at the "Y," the intersection of two roads near the Weaver property. As Striker was heading home in response to Weaver's call, Roderick shot and killed him. After his dog was killed, Sammy fired two shots in Roderick's direction, turned, and began to run home calling out "I'm coming, Dad . . . ." Cooper and Degan, who were hiding in the woods, then fired their guns. One of the two, most likely Degan, shot at the gun Sammy was holding, and severely injured his arm. Cooper then shot at Sammy after he was disarmed and while he was continuing to run away. The final shot hit Sammy in the back, killing him.

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[2] Marshals Norris, Thomas, and Hunt are not parties to this action.

A "melee" of firing erupted prior to the time Sammy was killed. Harris states he fired one or more shots into the woods in the direction of those he thought were trying to kill him as well as the others. He asserts, however, that those shots were fired in self-defense because he believed that he had to return the fire in order to protect his own life and that of Sammy. Degan was killed during the firestorm when a single round struck his upper shoulder. Harris admits that he may have fired the fatal shot.

Following this, the initial Ruby Ridge incident, Harris alleges that Cooper and Roderick met and conspired to lie about the events that occurred at the "Y." Harris maintains that, in order to conceal their wrongdoing, Cooper and Roderick decided to say that Harris was the aggressor —that he had initiated the firing and had not acted in self-defense. Their falsehoods, according to Harris, were intended to absolve them of responsibility for the deaths of both Degan and Sammy Weaver and to shift the blame to him.

After the initial shootings, the FBI dispatched a special unit designed to deal with crisis situations, called the "Hostage Rescue Team" (the "Team"). The Team, which was under the command of Richard Rogers, is composed of two types of agents: snipers and assaulters. The Team normally operates under the FBI's Standard Rules of Engagement which "provide that an FBI agent may kill a person with whom he or she comes into contact only when the person presents an immediate risk of death or great bodily harm to the agent or another person." However, a group of FBI and Marshal Service officials decided to rewrite the Rules of Engagement and create Special Rules of Engagement for Ruby Ridge. The Special Rules first provided that "*any* armed adult observed in the vicinity of the Weaver cabin could and should be killed," but were then narrowed to read "any armed adult *male*" in order to eliminate the possibility that the Team would fire at Vickie Weaver, Randall Weaver's wife. Furthermore,

Harris alleges that the agents involved represented to other agents that the situation at the Weaver property was a "continuing firefight" although there had been no firing of weapons for 32 hours.

During the afternoon of August 22, 1992, after being told by Rogers to follow the Special Rules, several members of the Team took positions on a hill overlooking the Weaver cabin. This group included Lon T. Horiuchi, a Team sniper, who, according to Harris, was a highly trained marksman equipped with a thick-barreled .308 caliber bolt action rifle. Harris alleges that with that combination of skill and equipment Horiuchi could hit a quarter-inch target at 200 meters.

At about 6:00 p.m. that evening, Weaver, his daughter Sarah, and Harris, who were in the cabin and unaware of the presence of the Team agents stationed on the hill, decided to go to the shed where they had placed Sammy's body after they had washed it and prepared it for burial. After arriving at the shed, Weaver reached up to open the latch and was shot in the back by Horiuchi. Weaver yelled to his wife, Vickie, that he had been shot and began to run back to the cabin, as did Sarah and Harris. Vickie, with her infant daughter Elisheba in one arm, held the outer cabin door open with the other. The complaint alleges that Horiuchi then fired a second shot in an effort to kill both Harris and Vickie. The bullet passed through the clear glass in the open door, striking Vickie in the head, and after passing through her, hit Harris in the upper arm and chest. Vickie Weaver was killed instantly.

After the shooting ended, FBI personnel drove a military tank onto the front yard of the Weaver property and, using a loudspeaker, announced their presence. Harris remained in the cabin, despite a shortage of food and water, for eight days, during which time the FBI employed a variety of tactics designed to lure those remaining in the cabin outside. These tactics included the constant playing of loud music, the use of bright lights at night to prevent

the Weavers and Harris from sleeping, referring to Vickie as if she were still alive, and taunting the cabin's occupants with descriptions of the food that was available to the agents. The FBI also installed cameras and microphones around the cabin and placed a remote-controlled robot with a shotgun attached aimed at the door. Harris, badly injured and in pain, alleges that he repeatedly asked his cabin-mates to shoot him in order to end his suffering. Vickie's body rested on the kitchen floor wrapped in blanets all the while. There is no indication in the complaint who, if anyone, in addition to Elisheba, Sarah, Weaver, and Harris, may have remained alive and in the cabin.

After eight days, Harris surrendered. He was taken to the hospital where he was treated for his injuries and underwent surgery. He was in intensive care for about twelve days.

Harris was then indicted in the United States District Court for the District of Idaho on a number of charges relating to the events of August 21 and 22. The charges included assault with a deadly weapon on Roderick, Cooper and Degan, as well as first degree murder of Degan. After a jury trial, he was acquitted on all charges.

Proceedings Below

Harris then brought this *Bivens* action in the district court, alleging violations of his Fourth, Fifth, and Sixth Amendment rights, for the actions that took place at Ruby Ridge. Harris sued the following thirteen individuals: Deputy Marshals Arthur Roderick and Larry Cooper; Deputy Director of the United States Marshal's Service G. Wayne "Duke" Smith; Directors of the United States Marshal's Service, Jose Antonio "Tony" Perez and Henry Hudson; FBI Special Agent and Director of the Hostage Rescue Team, Richard Rogers; Larry Potts, Assistant Director of the FBI in charge of the Criminal Division; FBI Special Agent and Member of the Team Lon T. Horiuchi; FBI Special Agent and Supervisor of the Team,

Steve McGavin; FBI Special Agent and Team Sniper Coordinator Les Hazen; FBI Special Agent and Team Logistics Coordinator, Dale Carnege; and FBI Special Agents William D. Gore and Eugene F. Glenn.

Harris claims that his Fourth Amendment rights were violated when Cooper and Roderick, by their actions—principally their fabrication and dissemination of a false account of the initial shooting incident—caused him to be shot and to suffer nearly fatal physical injuries; subsequently, he contends, the deputies' actions led to his arrest without probable cause and his wrongful prosecution for the murder of Marshal Degan. Harris next alleges that all thirteen named defendants conspired to and did deny him his Fourth Amendment rights by their preparation, authorization, and dissemination of the Special Rules of Engagement. More specifically, he contends that the Special Rules led Team sharpshooter Horiuchi to shoot and seriously wound him, in violation of his Fourth Amendment right to be free from the application of excessive force. He also seeks to hold Horiuchi directly liable for the shooting.

Defendants moved to dismiss the various counts for failure to state a claim and on the ground of qualified immunity. In a published opinion, *Harris v. Roderick*, 933 F. Supp. 977 (D. Idaho 1996), the district court denied the motions with respect to almost all of the Fourth Amendment claims.[3] Defendants appealed.

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[3] In Count One Harris alleged that Roderick and Cooper denied him his Fourth Amendment right to be free from unreasonable seizures and his substantive due process right under the Fifth Amendment when they shot *at* him at the "Y." The court dismissed that count on the ground that Harris was not seized during the incident. *Harris*, 933 F. Supp. at 984. In Count Six, Harris asked for declaratory relief in the form of a holding that the Special Rules were unconstitutional. Harris subsequently agreed that this count should be dismissed, and the district court did so. *Harris*, 933 F. Supp. at 988. In addition, Harris alleged a number of other Fourth and Sixth Amendment claims that were dismissed by the

I. THE CONSPIRACY TO SHIFT THE BLAME TO HARRIS FOR THE INCIDENT AT THE "Y"

In Counts Two and Three of his complaint, Harris alleges that Cooper and Roderick knowingly and intentionally conspired to and did deprive him of his Fourth Amendment rights by falsely telling other agents that he was the aggressor at the "Y" and that he did not act in self-defense, thereby causing the other agents to inflict on him the subsequent Fourth Amendment injuries he suffered. Cooper and Roderick lied, Harris claims, in order to conceal their own responsibility for the deaths of Degan, Sammy Weaver, and the dog Striker, and to falsely shift the blame to him. Moreover, Cooper and Roderick repeated these allegations before a grand jury leading to Harris's federal indictment and prosecution on charges stemming from the events at the "Y" and at the Weaver residence. They also repeated the false story at Harris's federal jury trial. We review Cooper's and Roderick's claims relating to qualified immunity and reject them in their entirety.

A. Heightened Pleading Standard

Cooper and Roderick first argue that Harris's complaint fails to meet the heightened pleading standard required for *Bivens* conspiracy claims. *Branch v. Tunnell*, 937 F.2d 1382, 1386 (9th Cir. 1991) (Branch I); *see also Buckey v. County of Los Angeles*, 968 F.2d 791, 794 (9th Cir. 1992) (requiring conspiracy complaint to "allege specific facts to support the existence of a conspiracy among the defendants"). The heightened pleading standard must be met in cases in which the subjective intent of the defendant is an element of the claim. *Branch I*, 937 F.2d at 1386. In order to survive a motion to dismiss, plaintiffs alleging a conspiracy to deprive them of their constitutional rights must "include in their complaint nonconclu-

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district court. None of the claims that were dismissed is before us on this appeal.

sory allegations containing evidence of unlawful intent or face dismissal prior to the taking of discovery." *Id.* These allegations may be supported by either direct or circumstantial evidence. *Id.* at 1387. This standard is not intended to be difficult to meet as "[i]t serves the limited purpose of enabling the district court to dismiss 'insubstantial' suits prior to discovery and allowing the defendant to prepare an appropriate response, and where appropriate, a motion for summary judgment based on qualified immunity." *Id.* at 1387 (quoting *Whitacre v. Davey*, 890 F.2d 1168, 1171 (D.C. Cir. 1989)). It is for the latter reason that "heightened pleading" is relevant for purposes of a qualified immunity appeal.

In his complaint, Harris alleges that after the gunfight in which Degan, Sammy Weaver, and the dog Striker were killed, "Larry Cooper and Arthur Roderick met separately and apart from the other Marshals, and constructed a false story about what had happened in the gunfight, which false story was designed to conceal their own and Willliam Degan's criminal, civil, and moral responsibility for the deaths of Sammy Weaver and William Degan." Harris also alleges that Cooper and Roderick repeated this story in official documents, reports, and under oath before both a grand and petit jury. As a result of these falsehoods, Harris claims that he was denied his right to be free from unreasonable seizure as guaranteed by the Fourth Amendment. More specifically, he alleges that the falsehoods led directly to Horiuchi's shooting and seriously wounding him, his imprisonment in the Weaver cabin for eight days and at the hospital for two more weeks after that, and ultimately to the bringing of false charges against him that resulted in the federal murder trial at which he was acquitted on all counts. Finally, he contends, the falsehoods caused him to serve time in jail awaiting trial on the federal charges.

In *Mendocino Environmental Center v. Mendocino County*, 14 F.3d 457 (9th Cir. 1994),[4] the plaintiffs, environmentalists who had participated in the planning and execution of a non-violent anti-logging rally, alleged that federal and state law enforcement officials formed a " 'federation or consortium' " with one another . . . to 'disrupt, suppress and neutralize' the program and its organizers." *Id.* at 459. More specifically, they claimed that after a bomb was detonated in one of the plaintiff's cars, law enforcement officials intentionally released false information to the press that was made to "smear them and other [organization] members as terrorists and violent fanatics." *Id.* at 460. Two organizers were ultimately charged with transportation of explosives. *Id.* at 459. The complaint alleged that the plaintiffs were arrested without probable cause and that the agents supplied false information to the magistrate, leading to the issuance of a search warrant. Both the state and federal officials moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) on the ground that it did not meet the heightened pleading standard required by *Branch I*. We held that the allegations in the complaint met the *Branch I* standard because they described the parts of the warrant affidavit that were false and asserted that those portions of the warrant were necessary to a probable cause determination. Although the complaint did not specifically allege which of the four named FBI officials actually supplied the information that led to the incorrect warrant affidavit, we held that the failure to do so cannot serve as a basis for granting a motion to dismiss. We pointed out "only the FBI agents can answer" that question and, therefore, the plaintiffs must be allowed to take discovery on the point. *Mendocino*, 14 F.3d at 463.

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[4] Although *Mendocino* was a case alleging conspiracy under § 1983, we observed in *Branch v. Tunnell*, 14 F.3d 449, 450 (9th Cir. 1994) (*Branch II*) that the analysis for both § 1983 and *Bivens* actions was the same where the defendant's subjective intent is an element of the claim.

We hold that Harris met the heightened pleading standard with respect to the conspiracy he alleges occurred between Cooper and Roderick, and that the complaint was adequate to permit defendants to assert their qualified immunity defense. Harris's complaint alleged two major overt acts. First, after the shootings of Degan, Sammy Weaver, and Striker, Cooper and Roderick met separate and apart from the other Marshals and constructed a false story about how the initial gunfight came about and what occurred during its course. Second, the complaint alleges, Cooper and Roderick told the false story to other agents and reiterated it during official (federal) investigations, at two (federal) preliminary hearings, before a (federal) grand jury, and at a (federal) jury trial. The malicious falsehoods, he claims, led to the shooting of Harris by Horiuchi as well as to Harris's arrest, detention and federal prosecution on various charges. Harris's allegations are detailed and specific and clearly meet the heightened pleading requirements of *Branch I* and *Mendocino*. He pleads with particularity as to which defendants conspired, how they conspired and how the conspiracy led to a deprivation of his constitutional rights, even though he does not identify which officer said or did what at which particular time.

B. The Causal Relationship

Cooper and Roderick claim that they are entitled to qualified immunity as to Counts Two and Three because even if they did lie about the events at the "Y," the falsehoods were not the "actual cause" of Harris's shooting, forcible arrest, and prosecution. They argue in effect that the various occurrences relating to Ruby Ridge are too attenuated to permit a finding that they committed a constitutional violation. We disagree.

We have explained the nature of the causation required in cases of this kind in *Johnson v. Duffy*, 588 F.2d 740 (9th Cir. 1978). There, we held that for purposes of

§ 1983 liability the requisite causal chain can occur through the "setting in motion [of] a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury." *Id.* at 743-44. There is little question here that Cooper and Roderick should have known that falsely placing the blame for the initial Ruby Ridge incident on Harris would lead to the type of constitutional injuries he suffered.

Harris's complaint states that both Cooper and Roderick lied about the events at the "Y" by portraying him as the aggressor and the culpable party, and that their falsehoods were the proximate cause of a series of constitutional injuries, including his shooting by Horiuchi, his being trapped in the Weaver home for eight days while suffering severe pain from his wounds, and his subsequent arrest, jailing and trial on various federal charges, including Degan's murder, all in violation of his Fourth Amendment rights. The allegations are sufficient to meet the rule set forth in *Johnson*.[5]

Cooper and Roderick contend that Harris's actions at the "Y," even as they are described in his complaint, were sufficient to give rise to probable cause for his arrest and detention for the crime of assaulting a federal officer in

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[5] The defendants' reliance on *White v. Roper*, 901 F.2d 1501 (9th Cir. 1990) is misplaced. In that case White, a prisoner, brought suit alleging that a guard physically forced him to enter a cell of another hostile inmate. White then ran away, and as a result of his confrontation with other prison guards, suffered cuts and bruises. He brought a § 1983 claim alleging "deliberate indifference" or an "intent to punish" in violation of the prisoner's due process rights. *Id.* at 1503. In that case, we held that for claims alleging deliberate indifference or intent to punish, White had to prove that the officer's actions were the "but for" cause of White's injuries. *Id.* at 1505. Harris, however, is not claiming deliberate indifference and thus the standard that is applicable to his pleading is that described in *Johnson*.

violation of 18 U.S.C. § 111 (1994).[6] They argue that because probable cause existed to arrest Harris independent of any lies that they may have told, the causal chain was broken. Here, Harris's complaint alleges that he acted in self-defense, and that had Cooper and Roderick told the truth about what occurred, he would not have been arrested for the shooting of Degan, let alone shot and almost killed by an FBI sniper.[7] Given the conflicting factual

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[6] § 111. Assaulting, resisting, or impeding certain officers or employees

(a) In general—Whoever—

(1) forcibly assaults, resists, opposes, impedes, intimidates, or interferes with [a federal law enforcement officer] while engaged in or on account of the performance of official duties . . .

shall, where the acts in violation of this section constitute only simple assault, be fined under this title or imprisoned not more than one year . . . .

[7] While an offender does not have to know that the person he is shooting at is a federal officer, *see United States v. Feola*, 420 U.S. 671 (1975), the Supreme Court has not foreclosed the possibility that the state of mind of the one accused of assault can be relevant for purposes of determining whether he had the requisite criminal intent to commit assault. The Court noted in *Feola*, "[f]or example, where an officer fails to identify himself or his purpose, his conduct in certain circumstances might reasonably be interpreted as the unlawful use of force directed either at the defendant or his property. In a situation of that kind, one might be justified in exerting an element of resistance, and an honest mistake of fact would not be consistent with criminal intent." *Id.* at 684.

Furthermore, as with traditional types of assault, defense of self is a defense to the charge. This court has recognized "a defense to assaulting a federal agent based on the defendant's honest mistake of fact or lack of knowledge that the victim is a law enforcement officer. This defense consists of (1) a mistake or lack of knowledge as to authority, (2) a reasonable belief that force was necessary to defend against an immediate use of unlawful force, and (3) the use of no more force than appeared reasonably necessary." *United States v. Morton*, 999 F.2d 435, 437-38 (9th Cir. 1993) (citations and footnote omitted). Furthermore the component requiring mistake or lack of knowledge does not relate necessarily to whether

assertions, we cannot say as a matter of law that independent probable cause existed or that it served to break the causal chain. Moreover, the complaint states that because of the conspirators' falsehoods Special Rules were promulgated that directed that Harris and others be shot on sight if in possession of a weapon when spotted. We cannot assume that the Special Rules would have been adopted if Cooper and Roderick had been truthful in their reports. In short, under all of the circumstances, we cannot say, on the basis of the complaint, that in the absence of Cooper and Roderick's falsehoods, Harris would have suffered the constitutional deprivations he incurred.

Finally, Cooper and Roderick argue that, because the individuals who actually executed the warrant and detained Harris are entitled to qualified immunity, they, too, are entitled to such immunity, at least with respect to the arrest and detention. While Cooper and Roderick are correct that officers who reasonably believe that there is probable cause to arrest a suspect are entitled to qualified immunity, it does not follow that Cooper and Roderick are entitled to immunity in this case. The complaint alleges that the arresting officers acted on the basis of falsehoods wilfully

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the accused knew the officer was a federal agent,"but with whether the defendant recognized that the agent was authorized to act in the manner which allegedly provoked the purported self-defense." *Id.* at 438 n.1; *see also United States v. Span*, 75 F.3d 1383, 1388 (9th Cir. 1996) (*Span II*) ("a person has a right to resist an officer who is using excessive force"). Put another way, "[t]he right of self-defense 'is not triggered by the absence of probable cause, but rather by the officer's bad faith or provocative conduct.' " *Span II*, 75 F.3d at 1389 (*quoting United States v. Span*, 970 F.2d 573, 580) (9th Cir. 1992) (*Span I*)). We also held in *Span I* that "an individual has a limited right to offer reasonable resistance to an arrest that is the product of an officer's personal frolic." 970 F.2d at 580. Because this case is before us as an appeal from a motion to dismiss, the plea of self-defense is relevant to the question of probable cause, given the allegations alleging a conspiracy to shift the blame for the initial incident from the officers involved to Harris.

created and disseminated by Cooper and Roderick. Cooper and Roderick are not entitled to qualified immunity for such conduct if it served as the basis for the arresting officers' beliefs. Officers who in good faith relied on Cooper and Roderick's reports may well be able to assert a successful qualified immunity defense based upon *Hunter*. The fabricators of a false story that misled them cannot.

Cooper and Roderick could not reasonably have been under any illusion that they could lawfully conspire to concoct and disseminate false reports and escape responsibility for the consequences of their misdeeds. It was reasonably foreseeable that the alleged falsehoods would lead to the unconstitutional shooting, as well as to the unlawful detention and wrongful prosecution of Harris. The allegations in Harris's complaint are sufficient to plead the requisite causal relationship.[8] *See Johnson*, 588 F.2d at 740.

C. The False Testimony

Cooper and Roderick contend that they have absolute immunity from claims that they gave false testimony: a) in official reports; b) before the grand jury that indicted Harris on the federal charges; and c) at his trial on those charges. They argue that even if they were not initially entitled to immunity for their pretrial statments, any prob-

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[8] We should reiterate that for purposes of this appeal we are required to assume that the allegations of the complaint are true. The defendants have chosen to appeal at a stage of the proceedings at which they have not yet even filed an answer to Harris's charges. That is a tactical decision they are free to make, *Behrens v. Pelletier*, 516 U.S. ——, 116 S. Ct. 834 (1996), and any adverse consequences that may ensue are simply a result of their voluntary choice. This is so even though we recognize that Harris's complaint appears to be inconsistent in part or to omit material events that may have a significant impact on the ultimate outcome on Counts Two and Three. (Compare, *e.g.*, paragraphs 31 and 34 of the complaint in respect to the location of Cooper and Degan during the initial shooting incident.)

lems in that respect were cured when the grand jury indicted Harris, thus determining that there was probable cause. This argument reflects the same specious reasoning that the two deputies employed in contending that they were immune for causing a false arrest because the arresting officers acted in good faith. The argument here is, in essence, that if a conspiracy to lie is so successful that on the basis of the lies a grand jury finds probable cause, the conspirators become immunized for the constitutional injury they have caused. We disagree. In *Hand v. Gary*, 838 F.2d 1420, 1426 (5th Cir. 1988), the Fifth Circuit examined the question whether state actors could assert immunity from liability for malicious prosecution simply because an indictment was obtained, regardless of the circumstances surrounding its return. The *Hand* court concluded that a finding of probable cause that is "tainted by the malicious actions of the government officials [involved]" does not preclude a claim against the officials involved. *Id.* We adopt the *Hand* reasoning.

The more difficult question, however, is whether Cooper and Roderick are entitled to immunity because law enforcement officers enjoy absolute immunity for false testimony in a variety of official fora, including the fora at issue here. While Cooper and Roderick are correct that police officers are generally entitled to absolute immunity for perjury committed in the course of official proceedings, *Briscoe v. LaHue*, 460 U.S. 325 (1983), complaining witnesses who wrongfully bring about a prosecution generally are not. *Malley v. Briggs*, 475 U.S. 335, 341 (1986).[9] Harris is alleging that Cooper and Roderick's actions were

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[9] *Malley* denied absolute immunity to officers whose testimony served as the basis for obtaining an arrest warrant. Warrant cases appear to constitute a separate line from those involving other more direct types of testimony. *See Hervey v. Estes*, 65 F.3d 784 (9th Cir. 1995). However, as we explain further in the text *infra*, this circuit has not yet decided whether the reasoning of *Malley* should be extended to other types of cases and applied whenever an officer functions as a "complaining witness."

functionally those of a complaining witness. When Cooper and Roderick conspired to construct a false story about the events that took place at the "Y," they deliberately set in motion a series of events that they anticipated (or should have anticipated) would lead to Harris's indictment, arrest, and federal trial for the murder of Officer Degan, a charge of which he was ultimately acquitted. Not only did Cooper and Roderick set the events in motion but, according to the complaint, they voluntarily provided crucial information, false though it was, at every step of the proceedings.

While we have extended the absolute immunity that exists for the testimony of law enforcement officials at the trial stage to other fora, including grand juries,[10] we have not considered the question whether there is an exception to the absolute immunity rule with respect to law enforcement witnesses who serve functionally as complaining witnesses. In other words, we have not determined whether *Malley* provides an exception to *Briscoe*. The Second, Fifth, Seventh, and Tenth Circuits have expressly concluded, however, that law enforcement officials are not entitled to absolute immunity for false testimony when they function as complaining witnesses. In announcing its holding, the Second Circuit in *White v. Frank*, 855 F.2d 956, 959 (2d Cir. 1988), reasoned that because complaining witnesses were not entitled to absolute immunity at common law, officers who function in that capacity are not entitled to such immunity under § 1983. The court said:

> initiating a baseless prosecution [is cognizable under § 1983], [because] his role as 'complaining witness' renders him liable to the victim under section 1983, just as it did at common law, and the fact that his testimony at a judicial proceeding may have been the means by which he initiated the prosecution does not

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[10] *See Little v. City of Seattle*, 863 F.2d 681, 684 (9th Cir. 1988).

> permit him to transpose the immunity available for defamation as a defense to malicious prosecution.

White, 855 F.3d at 961; *see also Anthony v. Baker*, 955 F.2d 1395, 1400 (10th Cir. 1992) (holding that the question of immunity for testimony given by law enforcement officials "hinges on whether [they] acted as a complaining witness or a lay witness."); *Enlow v. Tishomingo County*, 962 F.2d 501, 512 (5th Cir. 1992) (holding that disputed issues of fact as to whether officer served as a complaining witness precluded immunity finding). In *Curtis v. Bembenek*, 48 F.3d 281, 285 (7th Cir. 1995), the Seventh Circuit also recognized that a claim for malicious prosecution may be brought against a police officer, under appropriate circumstances. We agree with the reasoning of the other circuits and hold that if Cooper and Roderick functionally served as complaining witnesses who may be said to have initiated Harris's prosecution they are not entitled to absolute immunity for their false statements.[11]

The facts here present an even stronger case for providing an exception to the general rule than did those in the other circuits' cases. Here, Cooper and Roderick were not simply complaining witnesses. The thrust of Counts Two and Three is that Cooper and Roderick conspired to cover-up their own misdeeds and to shift the blame to Harris by fabricating and disseminating a false version of the events that occurred at Ruby Ridge. The subsequent official testimony was simply a part of the implementation of that conspiracy, a step in the overall plan. We do not believe that the general policy that immunizes false official testimony requires that we preclude Harris from showing

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[11] There is also a minority view. The Third Circuit in *Kulwicki v. Dawson*, 969 F.2d 1454 (3d Cir. 1992), expressly rejected the reasoning of *Baker* and *White* and refused to read the complaining witness exception in *Malley* as overriding the broad protection for law enforcement witnesses set forth in *Briscoe v. LaHue*, 460 U.S. 325 (1983).

the full range of occasions on which Cooper and Roderick's falsehoods were uttered, simply because some of them occurred before a grand or petit jury.[12]

II. THE SPECIAL RULES AND THEIR CONSEQUENCES

In Count Four, Harris alleges that all thirteen named defendants conspired to deny him his Fourth Amendment right to be free from excessive force when they altered the FBI's official policy on deadly force embodied in the Rules of Engagement. Harris claims that the conspirators knew (or should have known) when they authorized the Special Rules of Engagement that the new rules would lead to an excessive and unconstitutional use of force by federal agents against individuals then present at Ruby Ridge, including Harris. He alleges that in furtherance of the conspiracy, Rogers, Smith, McGavin, Horiuchi, and Carnege traveled to Idaho from the Washington, D.C. area. Then, he alleges, all thirteen named defendants conferred with each other either in person, by telephone, or in writing, and decided to formulate the Special Rules of Engagement, which permitted officers to "kill any armed adult observed near the Weaver residence, irrespective of whether the armed adult presented an immediate threat of harm to the agent or to another person."[13] As noted *supra*, "adult" was shortly changed to "adult male."

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[12] We are aware that following submission of this appeal Harris was charged by a county prosecutor with the murder of Degan in violation of the law of the state of Idaho. Ronald J. Ostrow, *FBI Sniper is Charged in Ruby Ridge Killing*, L.A. Times, Aug. 22, 1997, at A1 (describing how Harris was charged with murder of Degan and Horiuchi was charged with involuntary manslaughter in Vickie Weaver's death). Neither side has suggested that this development affects our decision. In any event, nothing in our decision precludes any party from calling the state prosecution to the attention of the district court following remand for whatever purpose may be appropriate.

[13] While Horiuchi states in his brief that members of the Team *were given* the Special Rules of Engagement, that is not how the

The defendants raise two principal arguments with respect to Harris's claim regarding the Special Rules of Engagement. First, they argue that Harris's conspiracy claim does not meet the "heightened pleading" requirement for *Bivens* conspiracy claims. Second, they urge that they are entitled to qualified immunity. We address both arguments.

A. Heightened Pleading

With respect to the "heightened pleading" requirement, we agree with the district court that Harris's conspiracy claim meets that standard. As we have already noted, the standard requires that the complaint include "nonconclusory allegations containing evidence of unlawful intent or face dismissal prior to the taking of any discovery." *Branch v. Tunnell*, 937 F.2d 1382, 1386 (9th Cir. 1991) (*Branch I*). Like the district court, we conclude that Harris has sufficiently pleaded nonconclusory allegations to survive a motion to dismiss with respect to each of the moving defendants. He alleges that several defendants traveled from Washington, D.C., and that they all met or spoke together regarding the formulation of the Special Rules of Engagement, which contemplated, and in fact led to, Harris's being shot and seriously wounded in violation of the Fourth Amendment. The allegations are sufficient to overcome the defendants' motion to dismiss.[14]

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actions are characterized in Harris's complaint which asserts that all thirteen named defendants helped to draft, or acquiesced in the drafting of, the Special Rules of Engagement, after conferring together.

[14] The defendants argue that Harris has not sufficiently stated what each officer did in the drafting of the Special Rules of Engagement. However, Harris is not required to do more than he has done. *See Mendocino Envtl. Ctr. v. Mendocino County*, 14 F.3d at 463 and discussion *supra* at 12617-12619; *see also Rutherford v. City of Berkeley*, 780 F.2d 1444, 1448 (9th Cir. 1986) (holding that jury could reasonably conclude that certain officers were liable despite the fact that the plaintiff, because he had been pushed to the ground, could not identify all the officers involved).

B. Qualified Immunity

The defendants' argument that they are entitled to qualified immunity for their actions requires a more detailed analysis. The purpose of qualified immunity is to effect a balance between the rights of persons residing in this country to be free from blatant constitutional violations and the need to ensure that the larger needs of society are met and that law enforcement personnel are not unnecessarily diverted from their duties. *Harlow v. Fitzgerald,* 457 U.S. 800, 813-14 (1982). Under the doctrine, law enforcement officers who are wrongdoers may sometimes escape the economic consequences of their actions. Officials who perform discretionary functions are afforded "qualified immunity, shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton,* 483 U.S. 635, 638 (1987). As we have held repeatedly, "[a] law enforcement officer is entitled to qualified immunity in a [*Bivens*] action . . . [if], in light of clearly established principles governing the conduct in question at the time of the challenged conduct, the officer could reasonably have believed that the conduct was lawful." *Mendoza v. Block,* 27 F.3d 1357, 1360 (9th Cir. 1994); *see also Alexander v. County of Los Angeles,* 64 F.3d 1315, 1319 (9th Cir. 1995); *Romero v. Kitsap County,* 931 F.2d 624, 627 (9th Cir. 1991).

In order to determine whether the defendants are entitled to qualified immunity, we engage in a two-pronged inquiry: "1) Was the law governing the official's conduct clearly established? 2) Under that law, could a reasonable officer have believed the conduct was lawful?" *Act Up!/ Portland v. Bagley,* 988 F.2d 868, 871 (9th Cir. 1993); *see also Mendoza,* 27 F.3d at 1360. Harris alleges that the Special Rules of Engagement permitted the unconstitutional use of deadly force. Defendants respond that Harris has failed to allege the violation of a clearly established

right. The specific questions we must decide are as follows: was it clearly established that the deadly force prescribed by the Special Rules violated constitutional requirements and should reasonable officers drafting the Special Rules have known that such was the case?

In *Graham v. Connor,* 490 U.S. 386 (1989), the Supreme Court held that "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* at 396. Ordinarily, our "inquiry is . . . whether the totality of the circumstances, (taking into consideration the facts and circumstances of the particular case including the severity of the crime at issue; whether the suspect poses an immediate threat to the safety of the officers or others; and whether he is actively resisting arrest or attempting to evade by flight) justified the particular type of seizure." *Curnow v. Ridgecrest Police,* 952 F.2d 321, 325 (9th Cir. 1991). In *Tennessee v. Garner,* 471 U.S. 1, 11 (1985), the Court held that the use of deadly force "to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable." Furthermore, the Court observed that "[i]t is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so." *Id.*

Certain principles are clearly established under the cases described above and others that implement the fundamental rules regarding the use of deadly force. Law enforcement officers may not shoot to kill unless, at a minimum, the suspect presents an immediate threat to the officer or others, or is fleeing and his escape will result in a serious threat of injury to persons. *See Curnow,* 952 F.2d at 325 (holding that "police officers could not reasonably have believed that the use of deadly force was lawful because Curnow did not point the gun at the offi-

cers and apparently was not facing them when they shot him the first time"); *Ting v. United States*, 927 F.2d 1504, 1511 (9th Cir. 1991) ("It was generally established at the time of the shooting that an officer could use deadly force to effectuate an arrest if, under the circumstances, he reasonably believed that such force was necessary to protect himself or others from serious bodily harm."). Moreover, whenever practicable, a warning must be given before deadly force is employed. *Garner*, 471 U.S. at 11-12.[15]

It is clear that the Special Rules that required the FBI agents to kill "*any* armed adult male" in the vicinity of the Weaver cabin mandated an unconstitutional use of force, and that no reasonable officer could have believed otherwise. The Rules instructed the officers that they "could and should" kill any adult male armed with a weapon in the vicinity of the Weaver cabin, regardless of whether he was threatening the officers or any other persons. No mention of a warning is made anywhere in the Special Rules. Instead, the Special Rules constituted a shoot-on-sight edict. Although an officer had been killed in a shootout and armed persons believed to be responsible for his death remained in the area, so extreme an order is patently unjustified.

The regular Rules of Engagement, which were changed by the defendants for the Ruby Ridge assault, provide that "an FBI agent may kill a person with whom he or she comes into contact only when the person presents an immediate risk of death or great bodily harm to the agent or another person." These Rules were clearly designed to comply with the requirements of the Constitution as ex-

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[15] We recognize the need for officers on the scene to make immediate on-the-spot judgments. *See Garner*, 471 U.S. at 32 (O'Connor, J., dissenting). That factor plays little, if any, part, however, in an assessment of the reasonableness of the conduct of persons preparing Rules or Regulations governing the conduct of law enforcement officers in the field.

plicated by the federal courts. The alteration of those Rules, to require that "*any* armed adult observed in the vicinity of the Weaver cabin could and should be killed," constitutes a gross deviation from constitutional principles and a wholly unwarranted return to a lawless and arbitrary wild-west school of law enforcement. The Special Rules violated clearly established law and any reasonable law enforcement officer should have been aware of that fact.

Defendants also appear to contend that they enjoy qualified immunity because the individual who actually shot Harris enjoys qualified immunity for his conduct. The argument is similar to the one advanced by Cooper and Roderick with respect to the arresting officers. It is a causation or proximate cause argument, essentially, and this time there are two clearly dispositive answers to it. First, whether Horiuchi's shooting of Harris lies at the end of the causal chain that started with the promulgation of the Special Rules, or whether that causal chain was broken because Horiuchi had cause to shoot Harris under the regular Rules of Engagement, is a fact question that cannot be resolved on a motion to dismiss. At this stage of the proceedings, the only facts before us reveal that Horiuchi was instructed to follow the Special Rules and that he then shot Harris. Second, it is extremely doubtful, for reasons we explain in the next section, that Horiuchi will ever be able to establish that he is entitled to qualified immunity for his conduct in shooting Harris. Certainly, as the record now stands, he cannot do so.

III. THE SHOOTING OF HARRIS BY HORIUCHI

In Count Five Harris alleges that the force used on him by Horiuchi was unreasonable because he "had committed no crime, posed no threat to the safety of officers or others, was not seeking to flee, and had not been warned of the presence of law enforcement officers or of their demand that he surrender." Harris alleges that Horiuchi

initially shot Weaver. He did so as Weaver was opening the door to the shed where his dead son Sammy's body lay. After Weaver was shot, Harris, Weaver, and Weaver's daughter Sarah, began to run toward the cabin, as they feared for their lives. As Harris entered the cabin, Horiuchi fired, hitting Vickie Weaver. The bullet passed through her body and landed in Harris's upper arm and chest. Harris seeks to hold not only Horicuhi liable for his injury but a number of Horiuchi's superiors.

A. Horiuchi

Horiuchi advances two main arguments in support of his claim for qualified immunity. First, he argues that the use of force was objectively reasonable under the circumstances. Second, he argues that any law to the contrary was not clearly established.

Horiuchi asserts that, independent of the mandate in the Special Rules that deadly force be used whenever an armed male is spotted near the Weaver cabin, the law at the time permitted law enforcement officials to use whatever force was objectively reasonable under the circumstances to effectuate an arrest, and, under the circumstances, the force he actually used was reasonably necessary to arrest Harris. In support of his argument, he relies upon *Graham* and the objective reasonableness test it announced. However, Horiuchi's actions simply do not pass the *Graham* test, which, as we have noted, requires a careful examination of all the facts and circumstances, viewed from the perspective of a reasonable officer on the scene.

Horiuchi asserts that the shot he fired while Harris was trying to return to the cabin was objectively reasonable because Harris presented a greater danger when he was in the cabin than when he was outside, and it was therefore necessary to prevent him from reentering. One of the many problems with Horiuchi's argument is that the force he used was designed to kill Harris, not simply to stop

him from reentering the cabin. That under all of the circumstances Harris's effort to return to the cabin he had left only minutes before did not justify so extreme a measure should have been apparent to any reasonable law enforcement officer.

Harris went to the shed with Randy Weaver and his daughter Sarah to help minister to the body of Weaver's dead son. Even though Harris was armed, he made no aggressive move of any kind when Horiuchi started shooting; instead, with the others, he ran back toward the cabin from which they had recently emerged. Examining Horiuchi's actions from the perspective of a reasonable law enforcement officer faced with the need to make on-the-spot decisions, it is plain to us that his actions were not objectively reasonable. *Graham*'s totality of the circumstances test does not permit the use of deadly force to kill a suspect who is running back to a cabin where he is temporarily staying and who makes no threatening movement of any kind, even though the suspect had engaged in a shoot-out with law enforcement officers on the previous day and may have been the person responsible for the death of one of the officers.

Horiuchi's shooting of Harris, is also plainly inconsistent with *Tennessee v. Garner,* which is the leading Supreme Court precedent regarding the use of deadly force. *Garner* holds:

> Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.

471 U.S. at 11. Horiuchi's shooting of Harris was not objectively reasonable. Harris was returning to the cabin, not escaping. Horiuchi gave him no warning and no opportunity to surrender or to otherwise cease his resistance to the exercise of lawful authority. The fact that Harris had committed a violent crime in the immediate past is an important factor but it is not, without more, a justification for killing him on sight. Horiuchi and his fellow officers were safely ensconced on the hill overlooking the Weaver cabin. No threatening movement was made by Harris with respect to Horiuchi or anyone else, even after Horiuchi shot Randy Weaver. The law that deadly force may not be used under the circumstances present when Horiuchi killed Vickie Weaver and seriously wounded Harris was clearly established under *Graham*, *Garner*, *Ting*, and *Curnow*, and no reasonable officer could have thought otherwise.[16]

Horiuchi contends that Harris has not alleged a violation of clearly established law because he has not presented any case involving similar circumstances. Horiuchi misconceives the requirements of qualified immunity law. Harris need not present a factually similar case in order to show that his constitutional rights were clearly established. Although the contours of the established right must be "sufficiently clear[,] . . . [t]his is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of preexisting law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. at 639 (citation omitted). The Court recently repeated this maxim in *United States v. Lanier*, 117 S. Ct. 1219, 1227 (1997), when it observed that "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific

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[16] Horiuchi's reliance on *Hegarty v. Somerset County*, 53 F.3d 1367 (1st Cir.), *cert. denied*, 116 S. Ct. 675 (1995), is misplaced. In *Hegarty*, the police shot a woman who was known to be unstable and was pointing a gun at them through the paper-thin walls of her cabin. The officers lives were clearly in danger. *Id.* at 1377.

conduct in question." It also cited a particularly cogent observation from the Seventh Circuit: "[t]he easiest cases don't even arise. There has never been . . . a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the official would be immune from damages liability." *Lanier*, 117 S. Ct. at 1227-28 (quoting *United States v. Lanier*, 73 F.3d 1380, 1410 (6th Cir. 1996) (Daughtrey, J., dissenting) (quoting *K.H. Through Murphy v. Morgan*, 914 F.2d 846, 851 (7th Cir. 1990)). As we held in *Mendoza*, "when 'the defendants' conduct is so patently violative of the constitutional right that reasonable officials would know without guidance from the courts' that the action was unconstitutional, closely analogous preexisting case law is not required to show that the law is clearly established." *Mendoza*, 27 F.3d at 1357 (quoting *Casteel v. Pieschek*, 3 F.3d 1050, 1053 (7th Cir. 1993)).[17]

Here, the generally applicable law was clearly established in *Graham* and *Garner* and the other cases discussed *supra*. Law enforcement officials may not kill suspects who do not pose an immediate threat to their safety or to the safety of others simply because they are armed. Whenever practicable, a warning must be given so that the suspect may end his resistance or terminate his flight. A desire to prevent an armed suspect from entering the place he is residing because it may be difficult to persuade him to reemerge is insufficient cause to kill him. Other means exist for bringing the offender to justice, even if additional

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[17] Horiuchi relies on *In re City of Philadelphia Litigation*, 49 F.3d 945, 971 (3d Cir.), *cert. denied*, 116 S. Ct. 176 (1995). In that case, several city officials, after armed combat with members of the MOVE organization who refused to leave their headquarters, decided to use an explosive device to remove a bunker in order that agents could enter the house through the roof. *Id.* at 949-51. Although lives were lost, that was not the intended result. The Third Circuit, in holding that several city officials were entitled to qualified immunity, recognized that the purpose of the mission was to bring the MOVE members out of their headquarters, not to kill them. *Id.*

time and effort are required. When Horiuchi shot Harris, without any warning, as he was retreating toward an area of safety, he acted in a patently unreasonable manner that violated clearly established law. That the conduct at issue violated Harris's constitutional rights should have been plain to any reasonable officer.

B. The Other Defendants

Finally, Harris claims that Horiuchi was aided and abetted by the other twelve named defendants when he denied Harris his clearly established Fourth Amendment rights. Although appellants are correct that federal officials are only liable for their own actions, and cannot be held liable under a respondeat superior theory, Harris does not contend that the other defendants are liable simply because they were Horiuchi's supervisors. Rather, Harris alleges that the other defendants actively encouraged Horiuchi's actions through the formulation of the Special Rules of Engagement, and that the issuance of the Special Rules was a precipitating cause of the shooting. We held in *Taylor v. List,* 880 F.2d 1040, 1045 (9th Cir. 1989), that "[a] supervisor is only liable for constitutional violations of his subordinates if the supervisor participated in or directed the violations, or knew of the violations and failed to act to prevent them." *See also Hamilton v. Yendell,* 981 F.2d 1062, 1066 (9th Cir. 1992) (reversing grant of summary judgment because prison officials who knew of inmates illness and allowed his condition to worsen could face liability). Harris alleges that the twelve named defendants developed the plan that resulted in his shooting and encouraged Horiuchi to fire at him. Those allegations are sufficient to state a claim under *Taylor* and *Hamilton.*

Summary

The complaint alleges that Cooper and Roderick conspired to cover-up their own wrongdoing and to shift the blame for the initial shootout at the "Y" from themselves

to Harris. In furtherance of this conspiracy, the complaint continues, the two officers concocted a false story, filed false official reports, and testified falsely before the grand jury and at Harris's federal trial. The complaint further alleges that the false reports led directly to Harris's near-fatal shooting, as well as to his subsequent arrest, detention and federal trial. The officers do not enjoy qualified immunity for such conduct.

The complaint also asserts that the thirteen defendants, working together, promulgated the Special Rules which required FBI agents to "shoot on sight" in order to "kill." The Rules directly infringed on the clearly established constitutional rights of those at whom they were aimed, including Harris. There is no qualified immunity for such conduct, either. Finally, the complaint alleges that in shooting Harris without warning, when he was retreating to the cabin, Horiuchi violated his clearly established constitutional rights. Because the law was firmly established that such a shooting contravenes the Fourth Amendment, and because a reasonable officer could not have believed that it was reasonable to shoot Harris under such circumstances, we affirm the district court's refusal to dismiss this portion of the complaint as well.

Conclusion

We hold that the officers named in Harris's complaint are not, on the basis of the record before us, entitled to qualified immunity for the actions that took place at Ruby Ridge in August 1992. The case is remanded to the district court for further proceedings consistent with this opinion.

AFFIRMED AND REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civ. No. 94-0359-S-BLW

KEVIN L. HARRIS,

Plaintiff,

v.

ARTHUR RODERICK, *et al.*,

Defendants.

May 28, 1996

MEMORANDUM DECISION AND ORDER

I.

INTRODUCTION

The Court has before it Motions to Dismiss filed by the Defendants. The Court heard oral argument on the Motions, and they are now at issue. In addition, the Plaintiff has filed a Motion to Preserve Evidence. The Court will resolve the Motions after reviewing the legal standards governing Motions to Dismiss and the allegations contained in Plaintiff's Second Amended Complaint.

II.

LEGAL STANDARDS GOVERNING MOTIONS TO DISMISS

A Motion to Dismiss should not be granted "unless it appears beyond doubt that Plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Clegg v. Cult Awareness Network,* 18 F.3d 752,

754 (9th Cir. 1994). All allegations of material fact in the complaint are taken as true and construed in the light most favorable to the non-moving party. *Buckey v. County of Los Angeles*, 968 F.2d 791, 794 (9th Cir.), *cert. denied*, 506 U.S. 909 (1992). Generally, the Court may not consider any material beyond the pleadings in ruling on a Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6). *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir.), *cert. denied*, —— U.S. ——, 114 S.Ct. 2704 (1994). If materials outside the pleadings are considered, the Motion is converted to a Motion for Summary Judgment governed by Rule 56. In this case, the Court has not relied on any material outside the pleadings for making the rulings contained in this decision. The Court takes the factual allegations in Plaintiff's Second Amended Complaint as true, and will restate and review those allegations before resolving the Motions to Dismiss.

III.

ALLEGATIONS CONTAINED IN SECOND AMENDED COMPLAINT

In 1992, Plaintiff Kevin Harris lived with Randy Weaver and Weaver's family on Ruby Ridge in northern Idaho. On August 21, 1992, six Deputy United States Marshals (DUSMs), including Defendants Roderick and Cooper, went onto Weaver's property. "The ostensible purpose of the DUSMs was to serve, or to prepare to serve, an arrest warrant upon Randall W. Weaver." *Plaintiff's Second Amended Complaint at p. 7, ¶ 29.*

"[A]t the intersection of two primitive roads near the Weaver property known as 'the Y,' [DUSMs] Cooper, Degan [William Degan], and Roderick, confronted Kevin Harris, Randall W. Weaver, Weaver's 14-year old son Sammy, and the Weaver family dog, . . . Striker." *Id.* at p. 7, ¶ 31. Harris asserts that Roderick fired a shot

killing Striker. "In surprise and fear at seeing his dog shot and killed, [Sammy Weaver] swore at Roderick and fired two shots from his rifle in Roderick's direction. He then turned to run home calling to his father, 'I'm coming, Dad. . . .'" *Id.* at p. 8, ¶ 33. Harris then asserts that after Sammy's shot, "the woods where Cooper and Degan were hiding erupted with gunfire. . . ." *Id.* at ¶ 34. Sammy was wounded by a shot from Degan, and then killed by a shot from Cooper. *Id.* William Degan was also shot and killed. Harris asserts that he fired shots "in lawful self defense" and concedes that he "may have fired the shot which killed William Degan." *Id.* at pp. 8-9, ¶ 35.

After this incident, "Cooper and Roderick met and decided to lie about how the incident actually occurred. In particular, they decided to say that Kevin Harris fired the first shot at the 'Y,' and that he otherwise acted solely as an aggressor and not in self defense." *Id.* at ¶ 37. "As a result of these lies, a warrant was issued for the arrest of Kevin Harris and he was charged with murder." *Id.* at ¶ 38.

In response to these events, the FBI's Hostage Rescue Team (HRT) arrived at Ruby Ridge on August 22, 1992. "The HRT ordinarily operates under the FBI's Standard Rules of Engagement. These rules provide that an FBI agent may kill a person with whom he or she comes into contact only when the person presents an immediate risk of death or great bodily harm to the agent or to another person." *Id.* at p. 10, ¶ 42. In this case, however, the HRT approved Special Rules of Engagement under which "*any* armed adult observed in the vicinity of the Weaver cabin could and should be killed. Thus, an armed adult was to be killed, irrespective of whether the person had been warned of the presence or identity of FBI agents, or posed a risk of flight or a threat of death or serious injury to anyone." *Id.* at ¶ 43 (emphasis in original). Later, the Special Rules of Engagement were modified to provide that "any armed adult *male* observed in

the vicinity of the Weaver cabin could and should be killed." *Id.* at ¶ 45 (emphasis in original).

At about 6 p.m. on August 22, 1992, Randy Weaver, his daughter Sarah, and Kevin Harris left the cabin and walked to a nearby shed. As Randy Weaver reached up to open the latch to the shed, he was shot in the back by HRT sniper Lon Horiuchi. Randy Weaver yelled that he was shot, and started running back to the cabin with Sarah and Kevin Harris. As the threesome ran through the front door of the cabin, Horiuchi fired a second shot, intending to kill Harris and Vickie Weaver. *Id.* at ¶ s 58-59. At this time, Vickie Weaver had heard her husband's shouts and was holding open the front door of the cabin. "The bullet from Horiuchi's rifle struck a clear window in the open door, passing through it and into the head of Vickie Weaver who was standing immediately behind the window, passing through Vickie Weaver's head and into the upper left arm and chest of Kevin Harris." *Id.* at p. 13, ¶ 55. Vickie Weaver died instantly, and Harris "suffered very nearly fatal gunshot wounds." *Id.* at ¶ 57.

Harris remained in the cabin for eight days, "in such intense physical pain and suffering, and also suffering from emotional despair, that he requested other persons present in the cabin to kill him, in order to end his misery and suffering." *Id.* at p. 15, ¶ 69. When he surrendered to authorities, Harris was taken to a hospital in Spokane where he remained in intensive care for twelve days. As a result of his injuries, Harris alleges that he continues to suffer "extreme physical pain," and that he has suffered a "permanent partial disability," among other injuries. *Id.* at p. 37.

Harris was charged with first degree murder, and six other charges including assault and firearms violations. After a criminal trial lasting nearly three months, Harris was acquitted of all charges.

In this lawsuit, Harris has sued thirteen individuals—FBI officials and DUSMs—and the United States. His claims against the individual defendants include claims for the violation of constitutional rights under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). His claims against the United States are brought under the Federal Tort Claims Act, and include claims for assault, battery, and negligence, among others. There are no pending motions filed by the United States that are at issue, and thus its claims will not be discussed.

IV.

MOTIONS TO DISMISS

1. Motion to Dismiss Count One

Count One contains a claim that DUSMs Cooper and Roderick used excessive force against Harris in violation of his constitutional rights under the Fourth and Fifth Amendments. More specifically, Count One asserts that DUSMs Cooper and Roderick used excessive force when they shot at Harris at the "Y," thereby "seizing" him in violation of his Fourth Amendment rights, and depriving him of liberty in violation of his Fifth Amendment rights.

To state a claim for a violation of the Fourth Amendment, Harris must show both that he was "seized" and that his seizure was effected with unreasonable force. *Brower v. County of Inyo*, 489 U.S. 593, 599 (1989). Defendants assert that Harris was never seized during the incident at the "Y" because he was not physically detained, was not hit by any bullets, and did not submit to the authority of the DUSMs.

A seizure "requires *either* physical force . . . *or* where that is absent, *submission* to the assertion of authority." *California v. Hodari D.*, 499 U.S. 621, 626 (1991) (em-

phasis in original). A physical force seizure "requires an intentional acquisition of physical control" by the officer, and occurs "only when there is a governmental termination of freedom of movement." *Brower*, 489 U.S. at 596, 597. But a physical force seizure "does not occur if an officer applies physical force in an attempt to detain a suspect but such force is ineffective." *U.S. v. Hernandez*, 27 F.3d 1403, 1407 (9th Cir. 1994), *cert. denied*, —— U.S. ——, 115 S.Ct. 1147 (1995). With regard to a seizure by submission, the Ninth Circuit has held that "momentary hesitation and direct eye contact prior to flight [do not] constitute submission to a show of authority." *Id.* at 1407.

There is no allegation in Harris's complaint that he was physically detained at the "Y" or that he submitted to a show of authority. During oral argument, Harris's counsel represented that if he was permitted to amend the complaint, he would allege that once the DUSMs started shooting, Harris threw himself to the ground, crawled behind a stump, "and return[ed] fire on one or more—takes one or more shots." *Transcript of Oral Argument* at p. 52, ll. 13-20. Counsel also represented that about ten minutes elapsed from the time that Harris returned fire to the time he fled back to the cabin. *Id.* at p. 54, ll. 22-23.

Given the liberal standard applied to requests to amend a complaint under Rule 15, the Court will assume that Harris's requested amendment is part of his complaint. The question is whether Harris was seized when he was forced by gunfire to take cover. Under *Hodari D*, a seizure could occur either by physical force or by submission. The Court will examine first whether Harris has properly pled a seizure by physical force.

The Defendants assert that Harris's complaint fails to properly plead a physical force seizure because it does not allege that Harris was shot during the incident at the

"Y." The Court finds this argument unconvincing. While *Hodari D* does quote from a fifty-year old treatise defining seizure to require "*touching* or submission," elsewhere, in Justice Scalia's own words, the majority opinion states that "seizure readily bears the meaning of a laying on of hands *or application of physical force* to restrain movement. . . ." *Hodari, D,* 111 S.Ct. at 1550-51. The phrase "application of physical force" is used in the disjunctive with the phrase "laying on of hands," and thus broadens the meaning of seizure beyond a physical touching. The phrase is certainly expansive enough to mean that a person is "seized" when his movement is restrained by gunfire even if he is not actually hit by a bullet.

But while a physical force seizure may not require being shot, it does require "an intentional acquisition of *physical control.*" *Brower,* 489 U.S. at 596 (emphasis added). It is difficult to understand how Harris could be under the physical control of someone he is shooting at. In fact, when he returned fire, Harris was acting entirely outside the control of the DUSMs. "A seizure does not occur if an officer applies physical force in an attempt to detain a suspect but such force is ineffective." *Hernandez,* 27 F.3d at 1407 (citing *Hodari D.* in support). Here, the force was ineffective: Harris returned fire for ten minutes and then fled. The DUSMs never acquired physical control over him. For these reasons, the Court finds as a matter of law, that the allegations of the Second Amended Complaint—as supplemented by the representations of counsel for Harris at oral argument—cannot under any interpretation state a cause of action for a physical force seizure in violation of the Fourth Amendment.

This leaves the issue whether Harris has properly pled a seizure by submission. Harris might have a strong case here if he simply dove for cover to avoid a hail of bullets. But Harris did more than seek safety—he returned fire.

The Court will assume the truth of Harris's declaration that he fired in self-defense. But even defensive shooting is hardly submissive behavior. By his own admission, Harris did not yield to authority but fought back. *Hodari D* and *Hernandez* stand for the proposition that there is no submission when a suspect flees. It would strain common sense to hold that a suspect who returns fire is more submissive than a suspect who flees. The Court therefore finds, as a matter of law, that the allegations of the Second Amended Complaint—as supplemented by the representations of counsel for Harris at oral argument—cannot under any interpretation state a cause of action for a seizure by submission in violation of the Fourth Amendment.

The Court turns next to the Fifth Amendment claim in Count One. The Supreme Court in *Graham v. Connor*, 490 U.S. 386 (1989) held that the Fourth Amendment is the exclusive remedy for excessive force cases. Harris argues that the Ninth Circuit does permit Fifth Amendment claims when the government has used its power in an abusive, irrational, or malicious way. *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1409 n. 10 (9th Cir. 1989), *cert. denied*, 494 U.S. 1016 (1990). But after the briefing was submitted in the present case, *Sinaloa* was overruled by *Armendariz v. Penman*, 75 F.3d 1311, 1326 (9th Cir. 1996). The *Armendariz* case recognized that *Graham* makes the Fourth Amendment the exclusive avenue of relief for excessive force cases. Thus, the Fifth Amendment claim in Count One must be dismissed.

Even if some uncertainty remains about the applicability of the Fifth Amendment to excessive force cases, the Defendants are entitled to qualified immunity for this claim. Qualified immunity protects law enforcement officials from liability for civil damages unless their conduct violates "clearly established rights of which a reasonable

person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800 (1982). The defense requires a two-part inquiry: (1) Was the law governing the officer's conduct clearly established? (2) Under the law, could a reasonable officer have believed his conduct was lawful? *Browning v. Vernon,* 44 F.3d 818, 822 (9th Cir. 1995). Harris bears the burden of proving the existence of a "clearly established" constitutional right. *Id.* If Harris satisfies that burden, then the Defendants bear the burden of establishing that their actions are reasonable, even if they violate Harris's constitutional rights. *Id.*

On August 21, 1992, when the incident at the "Y" occurred, Harris had no clearly established Fifth Amendment right to be free from excessive force applied by law enforcement agencies. At the very least, *Graham*—decided in 1989—made the law unclear. Defendants Roderick and Cooper are therefore entitled to qualified immunity for the Fifth Amendment claim contained in Count One.

In conclusion, the Court shall dismiss the Fourth and Fifth Amendment claims from Count One. Since those were the only claims contained in Count One, the Court will therefore dismiss Count One of the Second Amended Complaint.

2. Motion to Dismiss Count Two

Count Two alleges that DUSMs Roderick and Cooper conspired to deprive Harris of his Fourth, Fifth, and Sixth Amendment rights. Specifically, Count Two asserts that Roderick and Cooper lied about events at the "Y;" that these lies led to the Special Rules of Engagement; and that the Special Rules led to Horiuchi's shooting of Harris. In addition, Harris claims that the lies caused his later arrest, detention, and trial. Count Two asserts that Cooper and Roderick repeated their lies during official investigations; under oath before a United States Grand Jury; at two preliminary hearings before United States Magistrate

Judges; and at the jury trial itself. These lies, Harris asserts, led to his illegal arrest in violation of his Fourth Amendment rights. In addition, the lies led to a "capricious prosecution based upon less than probable cause," which violated his Fifth Amendment rights. Finally, the lies resulted in an unfair trial in violation of his Sixth Amendment rights.

With regard to the Sixth Amendment claim, the Defendants moved to dismiss the claim on the ground that Harris had failed to state a cause of action. While Harris responded to similar arguments regarding his Fourth and Fifth Amendment claims, he offered no response to support his Sixth Amendment claim. The Court therefore deems it waived, and will dismiss that portion of Count Two alleging a Sixth Amendment violation.

With regard to the Fifth Amendment claim, the Supreme Court has held that the Fifth Amendment "may not furnish the constitutional peg on which to hang . . . [the] tort [of malicious prosecution]." *Albright v. Oliver*, —— U.S. ——, 114 S.Ct. 807 (1994) (plurality). Harris characterized his Fifth Amendment claim in Count Two as one for malicious, or "capricious," prosecution. *See*, *Brief of Plaintiff* at p. 14. Thus, the Fifth Amendment claim in Count Two must be dismissed.

This leaves Harris's claim that his Fourth Amendment rights were violated when the lies of Roderick and Cooper led to his arrest, unsupported by probable cause. The Defendants seek to dismiss this claim on the ground that Harris has failed to plead a sufficient causal connection between the alleged lies and the arrest. In the Ninth Circuit, the conspiracy claim is subject to a heightened pleading standard. Specifically, Harris must allege "non-conclusory allegations" that are "specific and concrete enough to enable the defendants to prepare a response, and where appropriate, a motion for summary judgment based on qualified immunity." *Mendocino Environmental*

Center v. Mendocino County, 14 F.3d 457, 461 (9th Cir. 1994). The Court has examined the Second Amended Complaint and finds that it meets this heightened pleading standard. Like the conspiracy claim approved by the Ninth Circuit in *Mendocino*, Count Two details the formation of the conspiracy, the motivation behind its creation, and the actions of the participants in furthering its alleged ends. The Court shall therefore reject this challenge to Count Two.

The Defendants assert next that even if Roderick and Cooper had reported the events at the "Y" as alleged by Harris, there remains the undisputed fact that Harris killed Degan. This killing, Defendants assert, supplied an independent and exclusive basis for probable cause, thereby making any lies inconsequential. In essence, the Defendants seek a ruling that the killing of Degan—regardless of the surrounding circumstances—automatically and as a matter of law constituted probable cause justifying the shooting, arrest, and detention of Harris.

Defendant's argument is contrary to the Ninth Circuit's general rule that in civil rights cases alleging violations of the Fourth Amendment, "a determination of . . . probable cause requires an inquiry as to the facts and circumstances within an officer's knowledge . . . [and] is a matter of fact to be determined . . . by the fact finder." *Act Up!/ Portland v. Bagley*, 988 F.2d 868, 873 (9th Cir. 1993). In other words, probable cause is not determined by looking at one particular fact in isolation from all others. All the circumstances must be examined. And such an examination is not appropriate on a Motion to Dismiss. This argument shall therefore be rejected.

The Defendants claim qualified immunity from that portion of Count Two where Harris seeks recovery for his injuries caused by the gunshot wound inflicted by FBI sniper Lon Horiuchi. But as the Court will hold later in this opinion, the Court cannot find at this early stage of

the litigation that Horiuchi's conduct was objectively reasonable as a matter of law.

Defendants also claim qualified immunity from that portion of Count Two where Harris seeks damages for his arrest and detention. Defendants assert that the individuals who carried out the arrest and detention had probable cause to support their actions, or, at the very least, had a reasonable belief that they had probable cause.

The Court has already held that the actual determination of probable cause is a question of fact that cannot be made in this Motion to Dismiss proceeding. But the qualified immunity question is somewhat different, and requires only a finding that the officers had *a reasonable belief* that probable cause existed. "Even law enforcement officials who reasonably but mistakenly conclude that probable cause is present are entitled to immunity." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991).

In this Motion to Dismiss proceeding, the Court must assume Cooper and Roderick lied. Defendants other than Roderick and Cooper were involved in the shooting on August 22, 1992, and the subsequent arrest and detention of Harris. According to the Second Amended Complaint, these other Defendants relied on the lies of Roderick and Cooper in shooting, arresting, and detaining Harris. These other Defendants may assert a *Hunter* qualified immunity defense because they had no reason to doubt Cooper and Roderick.[1] But it would be anomalous to extend *Hunter's* qualified immunity to Cooper and Roderick because they lied so well that the arresting officers had no reason to doubt them. Defendants cite no cases holding that a defendant's own misrepresentations can provide the basis for a qualified immunity defense. This argument shall be denied.

---

[1] The Court addresses the qualified immunity defenses of the Defendants other than Cooper and Roderick later in this decision.

Defendants argue next that Count Two must be dismissed because Defendants have absolute immunity from claims of false testimony. They have no immunity, however, if their false testimony has played a role in initiating a prosecution. *Malley v. Briggs*, 475 U.S. 335 (1986); *See also, Hervey v. Estes*, 65 F.3d 784, 788 (9th Cir. 1995). Although Defendants assert that the Second Amended Complaint contains no express language charging them with initiating a prosecution, a fair reading of paragraphs 85(a) and (b) provides that the Defendants did in fact initiate prosecution. The Court will therefore reject the absolute immunity defense.

In conclusion, the Court shall grant that portion of the Motion to Dismiss seeking to dismiss the claims in Count Two based on Fifth and Sixth Amendment violations. The Court shall deny that portion of the Motion to Dismiss seeking to dismiss the Fourth Amendment violations from Count Two.

3. Motions to Dismiss Count Three

Count Three asserts that Roderick and Cooper deprived Harris of his Fourth, Fifth, and Sixth Amendment rights by lying about the incidents at the "Y." While Count Two was a conspiracy claim, Count Three is a straight constitutional violation claim. The parties did not make separate arguments regarding Count Three, but incorporated by reference their arguments regarding Count Two. The Court shall likewise treat the arguments on Count Two as applicable to Count Three, and shall make the same rulings. Thus, the claims for Fifth and Sixth Amendment violations in Count Three shall be dismissed, while the claims for Fourth Amendment violations shall remain.

4. Motions to Dismiss Count Four

Count Four alleges that DUSMs other than Roderick and Cooper, along with FBI agents, conspired to deprive

Harris of his Fourth and Fifth Amendment rights. More specifically, Count Four asserts that Defendants conspired to change the Rules of Engagement to permit law enforcement officers to kill any armed adult male observed near the Weaver residence "irrespective of whether the armed adult presented an immediate threat of harm to the agent or to another person." *See, Second Amended Complaint* at p. 28, ¶ 98(d). Harris goes on to allege that he was shot because FBI sniper Lon Horiuchi relied on these Special Rules of Engagement. *Id.* at ¶ 99.

The Defendants argue first that they cannot be liable for a conspiracy to use excessive force when the officer who actually applied the allegedly excessive force—Horiuchi—has qualified immunity for his conduct. Even if the Court cannot find as a matter of law that the shot was reasonable, Defendants assert, the Court can find that the law on excessive force was not clearly established and that Horiuchi has qualified immunity. Under either scenario, if Horiuchi is not responsible to Harris for the shooting, the other Defendants—whose liability is predicated on Horiuchi's shot—are also not responsible, according to Defendants.

Defendants assert that Horiuchi acted reasonably because at the time he shot Harris, he had probable cause to believe Harris had killed Degan, and Harris "was fleeing to the cabin, a secure position from which he would pose an *increased* threat to the officers." *See, Defendants' Brief* at p. 11 (emphasis in original).

The Supreme Court has held that an officer may use deadly force to prevent escape "if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm. . . ." *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). But assuming that the Second Amended Complaint is true, Harris was not escaping; he was retreating to a cabin

surrounded by law enforcement officers. From the face of the Second Amended Complaint, there is no indication that Harris was threatening the officers in any way. The Defendants have candidly conceded that no reported case has found as a matter of law that the use of deadly force is justified when the victim poses no immediate threat to officers and is not escaping. *See, Defendants' Brief* at p. 13.

The Defendants assert, however, that even if Horiuchi was mistaken, his mistake was reasonable and hence entitles him to qualified immunity. In support of this argument, Defendants cite *Hegarty v. Somerset County*, 53 F.3d 1367 (1st Cir. 1995), *cert. denied*, —— U.S. ——, 116 S.Ct. 675 (1996).

In *Hegarty*, the police responded to a call that a distraught woman was shooting at campers. The police immediately suspected Katherine Hegarty since the shots were coming from her cabin. The police knew that Hegarty was a "crack shot" who was also emotionally unstable. *Id.* at 1370. The police decided to surround the cabin, and they took positions against the outside walls of the cabin. But they soon discovered that the walls were paper-thin. *Id.* at 1379. The officers feared that Hegarty could shoot them simply by firing from inside the cabin through the wall. The officers could not retreat without running through an area devoid of cover. *Id.* One of the officers saw Hegarty through the back window, and Hegarty aimed her rifle at him before he retreated. *Id.* at 1371. At this point, two officers prepared to break through the front door. Another officer saw Hegarty raise her rifle toward the door, and so he shot and killed her.

In the ensuing litigation brought by Hegarty's survivors, the Court found that the officers had qualified immunity. It was important in that case that there was an immediate threat to the officers; on two occasions just prior to the shooting, Hegarty had aimed her rifle at police. In addi-

tion, the officers were in dangerously exposed positions. *Id.* at 1379. The officers had to act quickly, and the Court rightly refused to use hindsight to condemn their actions. It is also important to note that *Hegarty* was decided on summary judgment, not on a motion to dismiss. *Id.* at 1372.

There is nothing in Harris's Second Amended Complaint indicating that Horiuchi was in a position of danger —or subject to an immediate threat—comparable to that faced by the officers in *Hegarty*. The Court therefore cannot make a ruling as a matter of law at this point in the proceedings that Horiuchi is protected by qualified immunity.

The Defendants assert that they are nevertheless entitled to qualified immunity for drafting the Special Rules of Engagement because at the time the Rules were drafted, the Defendants knew that Degan had been killed by Harris, and that Harris posed a serious danger to law enforcement officers since he was armed and barricaded in a remote area. The Defendants cite no authority, however, analyzing similar rules of engagement under the *Garner* test discussed above. The Special Rules of Engagement permitted the use of deadly force without regard to whether the officers were in immediate danger or whether the suspect was escaping. In essence, the Special Rules of Engagement—according to the Second Amended Complaint—presumed that the officers were in constant immediate danger. The validity of that presumption under the test stated in *Garner*, is the central issue in resolving the Defendant's claim of qualified immunity. The Court is reluctant to pass on the issue without knowing all the circumstances surrounding the decision to draft the Special Rules of Engagement. Because this issue must await further factual development, the Court shall deny the Defendants' assertion that they are entitled to qualified immunity for drafting the Special

Rules of Engagement without prejudice to their right to raise the issue at a later point in this litigation. At this time, Harris has at least pled this matter sufficiently in his Second Amended Complaint.

The Court shall also reject Defendants' claims that the conspiracy claim is insuffiiciently pled. The Court's examination of Count Four indicates that it—like Count Two—meets the Ninth Circuit's heightened pleading standard. *Mendocino Environmental Center v. Mendocino County, supra.*

Finally, the Court once again finds that the Fifth Amendment claim must be dismissed under *Graham.* The Court shall deny the Motion to Dismiss to the extent it seeks to dismiss the Fourth Amendment claim from Count Four.

5. Motion to Dismiss Count Five

Count Five alleges that Horiuchi—aided and abetted by the other Defendants—violated Harris' Fourth and Fifth Amendment rights by shooting Harris. The Defendants central argument in support of their Motion to Dismiss Count Five has already been resolved by the Court. Defendants had argued that as a matter of law, Horiuchi's shot was reasonable, or in the alternative, that Horiuchi was entitled to qualified immunity. The Court rejected these arguments in the discussion earlier in this decision.

The Court shall, however, dismiss the allegations of a Fifth Amendment violation, once again relying on *Graham.* Defendants assert that the remaining Fourth Amendment claim must be dismissed because the Defendants other than Horiuchi are sought to be held liable under a respondeat superior theory. A federal official may only be held personally liable for damages based on his individual actions, and cannot be held liable on a respondeat superior theory. *Hamilton v. Endell,* 981 F.2d 1062 (9th Cir. 1992). In *Hamilton,* the Circuit held that a supervisor could be held

liable for the constitutional torts of his subordinate only "if the supervisor participated in or directed the violations, or knew of the violations and failed to act to prevent them." *Id.* at 1067 (quoting from *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989)).

The Second Amended Complaint asserts that the Defendants drafted the Special Rules of Engagement with the intent to encourage the HRT to attempt to kill Harris. These allegations do not simply assert that Horiuchi's superiors are responsible due to their position, but rather assert that they actively encouraged the shooting. This is sufficient under *Hamilton.*

In conclusion, the Court shall dismiss the Fifth Amendment allegations from Count Five but will leave the Fourth Amendment allegations.

6. Motion to Dismiss Count Six

Harris conceded that Count Six should be dismissed and the Court will so order.

7. Motion to Preserve Evidence

Harris has filed a Motion to Preserve evidence, asserting his suspicions that the Defendants may destroy or alter items of evidence returned to them after the criminal trial. The Government has filed a response indicating it has no objection to an Order forbidding the destruction of evidence, but objecting to Harris's attempt to prohibit even the transfer of evidence. The Court agrees with the Government's Proposed Order. There is no evidence here that the Defendants are actually destroying evidence. The Defendants do need to be able to transfer and handle the evidence in the conduct of routine legal tasks. The Court shall therefore grant in part Harris's Motion to Preserve Evidence, and will enter the Government's Proposed Order.

8. Stay of Discovery

On December 21, 1995, the Court entered a limited stay of discovery, with certain deadlines to be met when the Motions to Dismiss were resolved. This decision will resolve the Motions to Dismiss and trigger the deadlines set forth in that December 21, 1995 Order.

V.

ORDER

In accordance with the views expressed in the Memorandum Decision above,

NOW THEREFORE IT IS HEREBY ORDERED, that the Motion to Dismiss (Docket No. 33) filed by Defendants Cooper and Roderick be, and the same is hereby, GRANTED IN PART AND DENIED IN PART. The Motion is granted to the extent it seeks to dismiss Count One, and the Fifth and Sixth Amendment violation claims from Counts Two and Three. The Motion is denied in all other respects.

IT IS FURTHER ORDERED, that the Motion to Dismiss (Docket No. 36) filed by the other Defendants shall be, and the same is hereby, GRANTED IN PART AND DENIED IN PART. The Motion is granted to the extent it seeks to dismiss the Fifth Amendment claims from Counts Four and Five, and to the extent it seeks to dismiss Six. The Motion is denied in all other respects.

IT IS FURTHER ORDERED, that the Motion to Preserve Evidence (Docket No. 11) shall be, and the same is hereby, GRANTED IN PART AND DENIED IN PART. The Motion is granted to the extent that no party shall purposely destroy, alter, or abandon any original or nonduplicative documents or physical evidence that relate to this action. This Order does not apply to duplicative copies of documents or the performance of any

other routine tasks related to the conduct of the litigation. The Motion shall be denied in all other respects.

Dated this 28th day of May, 1996

/s/ B. Lynn Winmill
B. LYNN WINMILL
United States District Court

(2)

Supreme Court, U.
FILED
JAN 12 1998
CLERK

No. 97-1051

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

G. WAYNE "DUKE" SMITH, *et al.*,
Petitioners,

v.

KEVIN L. HARRIS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENT LON T. HORIUCHI IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ADAM S. HOFFINGER
Counsel of Record
EARL J. SILBERT
PATRICIA L. MAHER
SCHWALB, DONNENFELD & SILBERT, P.C.
1025 Thomas Jefferson St., N.W.
Suite 300 East
Washington, D.C. 20007
(202) 965-7910
Counsel for Respondent Lon T. Horiuchi

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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Respondent Lon T. Horiuchi supports the petition for writ of certiorari in this case.

Respectfully submitted,

ADAM S. HOFFINGER
Counsel of Record
EARL J. SILBERT
PATRICIA L. MAHER
SCHWALB, DONNENFELD & SILBERT, P.C.
1025 Thomas Jefferson St., N.W.
Suite 300 East
Washington, D.C. 20007
(202) 965-7910
Counsel for Respondent Lon T. Horiuchi

January 12, 1998

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RESPONDENT'S BRIEF IN OPPOSITION

DAVID Z. NEVIN
(Counsel of Record)
DENNIS BENJAMIN
NEVIN, HERZFELD
& BENJAMIN LLP
P.O. Box 2772
Boise, Idaho 83701
(208) 343-1000

ELLISON MATTHEWS
MATTHEWS LAW OFFICE
P.O. Box 1988
Boise, Idaho 83701
(208) 336-1433

Counsel for Respondent.

Washington, D.C. • THIEL PRESS • (202) 328-3286

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QUESTION PRESENTED

Should this Court exercise its certiorari jurisdiction in order to review the sufficiency of a complaint that has already been reviewed and found sufficient by both the District and Circuit Courts?

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STATEMENT OF THE CASE

Nature of the Case

This is a *Bivens*[1] action filed by Kevin L. Harris to recover damages for violation of his constitutional rights by the Defendant federal agents.

Course of Proceedings and Disposition

The activities which underlie Mr. Harris's causes of action arose between August 21, 1992 and July 8, 1993. Mr. Harris filed his Complaint on August 16, 1994, and his Second Amended Complaint on September 13, 1995. The case was assigned to the Hon. B. Lynn Winmill, United States District Judge for the District of Idaho.

The Petitioners and the other Defendants filed their motions to dismiss on the pleadings, raising the issue of qualified immunity. Judge Winmill in part granted and in part denied the motions in his Memorandum Decision and Order of May 28, 1996. The claims that the defendants were entitled to qualified immunity were denied. The defendants filed timely Notices of Appeal.

Statement of Facts

The following statement of facts is taken from Plaintiff's Second Amended Complaint (Complaint), which on appeal from denial of the Defendants' 12(b)(6) motion is taken to be true.

On August 21, 1992, a team of six Deputy United States Marshals (DUSMs), including Defendant-Appellants Arthur Roderick and Larry Cooper, and William

---

[1] *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

Degan, traveled surreptitiously to a remote area of Boundary County, Idaho, which was owned by Randall W. Weaver (the Weaver property). Their ostensible purpose was to serve, or to prepare to serve, an arrest warrant upon Randall W. Weaver. Complaint at ¶ ¶ 27 & 29.

Kevin Harris was a family friend of the Weavers who was living part time at the Weaver property. There was no warrant outstanding for his arrest. During the late morning of the 21st, at the intersection of two primitive roads near the Weaver property known as "the Y," Cooper, Degan and Roderick confronted Kevin Harris, Randall W. Weaver, Weaver's 14-year-old son Sammy, and the Weaver family dog, a large yellow Labrador retriever named Striker. Complaint at ¶ ¶ 31; 36.

Roderick shot and killed the dog, even though it posed no threat whatever to the DUSMs (indeed, Striker was shot in the back after having turned to run toward his home). Complaint at ¶ 32. Sammy Weaver was standing in the immediate area, and in the general line of fire, when Striker was killed. In surprise and fear at seeing his dog shot and killed, he swore at Roderick and fired two shots from his rifle in Roderick's direction. He then turned to run home, calling to his father, "I'm coming, Dad. . . ." Complaint at ¶ 33.

After Sammy fired at Roderick, the woods where Cooper and Degan were hiding erupted with gunfire from their weapons. One of the two, probably Degan, fired at Sammy with sufficient accuracy to shoot the gun he was holding, grazing its stock and opening a gaping shredding wound in Sammy's right arm. Another of the two, probably Cooper, shot at Sammy as he was running *away* from the scene, at a time after the gun had been shot from Sammy's hands, and when he in any event no longer posed a threat to anyone. The shot hit Sammy square in

the back, piercing his heart, and passing out of his front chest wall. The boy cried out briefly, and dropped dead on the path. Complaint at ¶ 34.

In the melee of firing in which Sammy was killed, Kevin Harris fired one or more shots into the woods in the area of the persons he perceived to be trying to kill him and Sammy. These shots were fired by Kevin Harris in lawful defense of himself or another, that is, upon the reasonable belief that the shots were necessary to prevent his own death and/or the death of his young friend Sammy. During this shooting William Degan was hit in the upper left shoulder with a single round, from which he died. Kevin Harris may have fired the shot which killed William Degan. Complaint at ¶ 35.

The DUSMs had no warrant for the arrest of Kevin Harris or Sammy Weaver, nor were they justified by any other provision of law or circumstance in using force, deadly or otherwise, against Striker, Sammy Weaver, or Kevin Harris. Complaint at ¶ 36.

In order to conceal their own responsibility for the deaths of William Degan and Sammy Weaver, and for other improper purposes, Larry Cooper and Arthur Roderick met and decided to lie about how the incident actually occurred. In particular, they decided to say that Kevin Harris fired the first shot at the "Y," and that he otherwise acted solely as an aggressor and not in self defense. Based on these lies, a warrant was issued for the arrest of Kevin Harris and he was charged with murder. Complaint at ¶ ¶ 37 & 38.

The FBI soon dispatched to the scene its renowned "Hostage Rescue Team" (HRT). The HRT is a group of highly trained FBI agents whose purpose is to deal with crisis situations. Defendant Lon Horiuchi is a member of the HRT.

The HRT (like all FBI agents) is obligated to operate under the FBI's Rules of Engagement. These rules provide that an FBI agent may kill a person with whom he or she comes into contact only when the person presents an immediate risk of death or great bodily harm to the agent or to another person. Complaint at ¶ ¶ 40-2.

In this case, however, for the first time in the history of the FBI, a group of the Defendants, *i.e.* the Petitioners in this proceeding, conspired to create "Special" Rules of Engagement. Under these special rules, the HRT was ordered that *any* armed adult observed in the vicinity of the Weaver cabin could and should be killed (upon additional studied reflection, the Rules were later modified to provide that any armed adult *male* could and should be killed on sight). In the euphemistic language of the rules themselves, persons were to be "the subject of deadly force," irrespective of whether they posed a risk of flight, a threat of death or serious injury to anyone, or had been warned of the presence or identity of law enforcement officers. Complaint at ¶ ¶ 43, 45.

By mid afternoon on August 22, 1992, acting under the Special Rules of Engagement, elements of the HRT, including Horiuchi, took up a variety of positions on a hill overlooking the Weaver cabin. Horiuchi was a HRT "sniper," superbly trained and equipped, capable of reliably hitting a ¼" target at 200 meters with his .308 caliber snipers' rifle. Complaint at ¶ ¶ 47-9.

At about 6 p.m., Randy Weaver, his daughter Sarah, and Kevin Harris were inside the Weaver cabin, unaware of the throng of FBI agents and others outside. They made a decision to go to a nearby shed where they had placed the body of Sammy Weaver, washed and wrapped in preparation for burial. As the three left the home, they were observed by Horiuchi and others.

Horiuchi testified under oath in the criminal proceedings against Mr. Harris that he intended to shoot and kill as many of the persons in the cabin as he possibly could. He therefore did not take his first opportunity to shoot Randy, Kevin or Sarah because he believed it was possible yet more persons would come out of the cabin, and that they could be shot and killed as well. Complaint at ¶¶49-50.

Shortly, however, as Randy Weaver reached up to open the latch on the shed where his son's body lay, Horiuchi shot him in the back, in the fleshy skin under his armpit. Randy Weaver called out in a loud voice that he had been shot, and Randy, Sarah and Kevin then ran to the cabin. Complaint at ¶¶51-53.

In this, Mr. Harris threatened no one. He did not take cover and return fire, or attempt to do so. Nor was he attempting to avoid arrest – rather he sought by returning to the cabin simply to provide cover for himself against Horiuchi's ruthlessly efficient and unlawful effort to kill him. No warning of the presence of the law enforcement officers, or any demand that he surrender, had been provided to Mr. Harris or the Weavers. On the contrary, a warning would have compromised Horiuchi's plan to kill Mr. Harris and Mr. Weaver. Complaint at ¶¶51-3; 60-62; 99; 103.

Hearing Horiuchi's first shot and the shouts of her husband, Vickie Weaver came to the front door of the cabin. Holding the Weavers' infant daughter Elisheba in one hand, Vickie Weaver held the cabin door open with her other hand. As Randy and Sarah Weaver and Kevin Harris ran toward the front door, Horiuchi fired his rifle. The bullet from Horiuchi's rifle struck a clear glass window in the open door, passing through it and into the head of Vickie Weaver who was standing immediately

behind the window, passing through Vickie Weaver's head and into the upper left arm and chest of Kevin Harris. The shot killed Vickie Weaver and very nearly killed Kevin Harris. The injuries suffered by Mr. Harris as a result of this shooting are among those which are the subject of the present suit. Complaint at ¶¶55-59.

Not until immediately *after* the shootings of Randy Weaver, Vickie Weaver, and Kevin Harris, did the FBI advise the persons in the cabin that law enforcement officers were outside their home, and that their surrender was demanded. It did this by driving a military tank into the front yard of the residence and making the announcement over a loudspeaker. Complaint at ¶62.

With Sammy Weaver, age 14, shot in the back and dead in the nearby shed, Vickie Weaver's dead body wrapped in blankets on the kitchen floor, Kevin Harris shot and near death, and Randy Weaver shot in the back, the persons in the cabin reasonably disbelieved the FBI's assurances that if they simply came out of the cabin they would be protected. Reasonably believing that if they came outside the cabin they would be killed, the persons inside the cabin, including Kevin Harris, were forced to remain inside the cabin. Despite a shortage of food, water, and other necessities of life, Kevin Harris remained inside the cabin for some eight days before finally surrendering.

Mr. Harris was in such intense physical pain and suffering, and also suffering from emotional despair, that he begged other persons present in the cabin to kill him, in order to end his misery and suffering. Complaint at ¶¶66-69.

Mr. Harris and Mr. Weaver were charged with the murder of Mr. Degan, as well as a host of other offenses

in the case of *United States of America v. Randall Weaver and Kevin Harris,* D. Idaho Case No. 92-N-080-EJL. On July 8, 1993, the jury returned its verdict acquitting Kevin Harris of all charges against him. Complaint at ¶ 75.

Subsequently, Mr. Harris filed a *Bivens* type claim against each of the petitioners.

REASON FOR DENYING THE WRIT

THE PETITION FAILS TO IDENTIFY AN ISSUE WORTHY OF THIS COURT'S ATTENTION

The petitioners ask this Court to conduct a factually-based analysis of the sufficiency of the Complaint. This, of course, has already been done, not once but twice, by the lower courts. The parsing of an individual complaint to determine whether it complies with well-settled law is not a matter which warrants this Court's time and effort.

It is worth noting that the petitioners never identify a basis for the exercise of this Court's certiorari jurisdiction. They do not claim there is a Circuit conflict. They do not claim that the Circuit Court's decision is in conflict with a decision of a state court of last resort. They do not claim that either the District or Circuit Court has so far departed from the accepted and usual course of judicial proceedings to warrant this Court's exercise of its supervisory powers. *See,* S.C.R. 10. They do not even claim that the Circuit failed to identify the proper legal standard to apply. To the contrary, they concede that the Ninth Circuit law imposes a "heightened pleading standard" to conspiracy claims. Petition for Writ of Certiorari at 8, *citing Branch v. Tunnell,* 14 F.3d 449

(9th Cir.), *cert. denied*, 512 U.S. 1219 (1994).[2] Finally, they do not argue that the standard should be different from the Circuit law on the subject.

Instead, the petitioners merely argue that, in their view, the Circuit Court panel failed to correctly apply well-settled law to the particular facts of this case. That, however, even if it were true, is not a "compelling reason" which would justify the granting of review. That is why "[a] petition for writ of certiorari is rarely granted when the asserted error consists of an erroneous factual finding or the misapplication of a properly stated rule of law." S.C.R. 10.

The proper avenue for the petitioners would have been for them to file a petition for rehearing in the Circuit Court, as did the other defendants in this case.[3] *See*, F.R.A.P. 40 (petition for rehearing appropriate when Circuit has misapplied facts of case to applicable law). The fact that the petitioners failed, whether by strategy or neglect, to take advantage of the procedure available to them does not create a reason for this Court to grant review.

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[2]The rule in the Ninth Circuit is that "[i]n order to survive a motion to dismiss, plaintiffs must state in their complaint non-conclusory allegations setting forth evidence of unlawful intent. The allegations of facts must be specific enough to enable the defendants to prepare a response, and where appropriate, a motion for summary judgment based on qualified immunity." *Branch v. Tunnell* (*"Branch II"*), 14 F.3d at 452, *quoting*, *Branch v. Tunnell* (*"Branch I"*), 937 F.2d 1382, 1386 (9th Cir. 1991) (which adopted rule announced in *Siegert v. Gilley*, 895 F.2d 797 (D.C. Cir. 1990), *aff'd on other grounds*, 500 U.S. 225 (1991)). This "heightened" pleading standard is applied in many other circuits. *See*, Petition for Writ of Certiorari at pg. 7, n.6 (cases collected).

[3]As noted in the Petition, two other defendants, Arthur Roderick and Larry Cooper, filed a Petition for Rehearing and Suggestion for Rehearing En Banc, which is currently pending.

Finally, it is not necessary for this Court to hold the Petition pending its decision in *Crawford-El v. Britton*, 93 F.3d 813 (D.C. Cir. 1996) (*en banc*), *cert. granted*, 117 S.Ct. 2451 (June 16, 1997, argued December 1, 1997) (No. 96-827). In that case, the U.S. Court of Appeals for the District of Columbia held: 1) that a civil rights plaintiff need not allege "direct" evidence of unconstitutional motive and 2) that "unless the plaintiff offers clear and convincing evidence on the state-of-mind issue at summary judgment and trial, judgment or directed verdict (as appropriate) should be granted for the individual defendant." 93 F.3d at 815.

As to the first holding, the D.C. Circuit abandoned the approach used in its previous qualified immunity cases such as *Siegert v. Gilley*, 895 F.2d 797 (D.C. Cir. 1990), *aff'd on other grounds*, 500 U.S. 225 (1991), and replaced it with a lower standard. The Ninth Circuit, as previously noted, adopted the D.C. Circuit's *Siegert* pleading requirement in *Branch I.* 927 F.2d at 1386. And that was the pleading standard applied by the Circuit Court in this case. In other words, Mr. Harris's pleading has already been tested by the more stringent standard of *Siegert.* Thus, it would also be found sufficient under the less demanding approach of the D.C. Circuit in *Crawford-El.*

Further, this Court should not hold the Petition pending its resolution of the second holding in *Crawford-El* because the "clear and convincing evidence" requirement announced by the D.C. Circuit applies only to summary judgment motions. However, no summary judgment motion has been filed in this case. This case is on appeal from a denial of a motion to dismiss.[4] And in the

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[4]The District Court clearly stated that it was not considering the petitioner's motion as one for summary judgment. *See,*

[footnote continued]

absence of such a motion, this Court's eventual resolution of that issue will have no effect on this appeal.

CONCLUSION

For the foregoing reasons, Kevin Harris requests that the petition be denied.

Respectfully submitted,

DAVID Z. NEVIN
DENNIS BENJAMIN
NEVIN, HERZFELD
& BENJAMIN
P.O. Box 2772
303 W. Bannock Street
Boise, Idaho 83701
(208) 343-1000

ELLISON M. MATTHEWS
MATTHEWS LAW OFFICES
P.O. Box 1988
413 W. Jefferson Street
Boise, Idaho 83701
(208) 336-1433

Attorneys for Respondent
Kevin L. Harris.

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District Court Memorandum Decision, in Petition for Writ of Certiorari at pg. 33a.